Boston College Law Review

Volume 25
Issue 4 *Number 4*

Article 4

7-1-1984

The NLRB's Discovery Practice and the Procedural Effect of Bill Johnson's Restaurant v. National Labor Relations Board

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THE NLRB'S DISCOVERY PRACTICE AND THE PROCEDURAL EFFECT OF *BILL JOHNSON'S RESTAURANT, INC. v. NATIONAL LABOR RELATIONS BOARD*

The National Labor Relations Act (the "NLRA")[1] authorizes the National Labor Relations Board (the "Board") to make rules and regulations necessary to carry out the provisions of the NLRA.[2] Pursuant to this authority the Board has always limited pre-hearing discovery in unfair labor practice proceedings.[3] The Board reasons that its restrictive discovery rules and regulations are necessary to prevent employers and unions from intimidating employees and inhibiting employees from exercising statutory rights under the NLRA.[4] In *National Labor Relations Board v. Robbins Tire & Rubber Co.*,[5] the United States Supreme Court supported the Board's restrictions on discovery by holding that pre-hearing witness statements are exempt from disclosure under the Freedom of Information Act.[6] By so holding, the Court endorsed a previous line of circuit court cases which had expressly upheld the Board's discovery rules.[7] Despite this judicial approval, employers and unions, eager to obtain information regarding unfair labor practice charges brought against them, have used a number of tactics in attempting to circumvent the Board's restrictive discovery rules.[8] Although most of these attempts have been unsuccessful, in the recent case of *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board*,[9] the Supreme Court opened a potential procedural loophole in unfair labor practice proceedings that may encourage employers and unions to bring frivolous state court suits for the purpose of using state court discovery procedures to bypass the Board's restriction.[10]

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* The author gratefully acknowledges the conceptual ideas and assistance provided by Visiting Associate Professor Kenneth B. Hipp.

[1] 29 U.S.C. §§ 151-169 (1982). 49 Stat. 449-57 (1935), as amended by 61 Stat. 136-52 (1947), 65 Stat. 601 (1951), 72 Stat. 945 (1958), 73 Stat. 525-42 (1959), 84 Stat. 930 (1970), 88 Stat. 395-97 (1974), 88 Stat. 1972 (1975), 94 Stat. 347 (1980), 94 Stat. 3452 (1980), 29 U.S.C. 169 (Supp 1981).

[2] *See* 29 U.S.C. § 156 (1982).

[3] N.L.R.B. Case Handling Manual, Part I, Unfair Labor Practice Proceedings, (CCH) ¶ 10292.4 (1983) [hereinafter cited as N.L.R.B. Case Handling Manual]; *see also* 2 THE DEVELOPING LABOR LAW 1625 (C. Morris 2d ed. 1983) [hereinafter cited as THE DEVELOPING LABOR LAW].

[4] *See infra* notes 80-86 and accompanying text.

[5] 437 U.S. 214 (1978).

[6] *Id.* at 236; *see also infra* notes 87-111 and accompanying text.

[7] *See* Roger J. Au & Son v. NLRB, 538 F.2d 80, 83 (3d Cir. 1976); NLRB v. Valley Mold Co. Inc., 530 F.2d 693, 695 (6th Cir. 1976); D'Youville Manor, Lowell, Mass., Inc. v. NLRB, 526 F.2d 3, 7 (1st Cir 1975); NLRB v. Interboro Contractors, Inc., 432 F.2d 854, 858-60 (2d Cir. 1970), *cert. denied*, 402 U.S. 915 (1971); North American Rockwell Corp. v. NLRB, 389 F.2d 866, 871-74 (10th Cir. 1968); NLRB v. Vapor Blast Mfg. Co., 287 F.2d 402, 407-08 (7th Cir. 1961); NLRB v. Globe Wireless Ltd., 193 F.2d 748, 751 (9th Cir. 1951).

[8] *See infra* notes 148-68 and accompanying text.

[9] 103 S. Ct. 2161 (1983).

[10] Discovery is so desirable to respondents in Board proceedings that the opening created by *Bill Johnson's* will result in a large number of civil cases being filed for discovery purposes. *See* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 237 n.17 (1978). In *Robbins* the Court stated that "if the Court of Appeals ruling below were not reversed, the Board anticipated that prehearing requests for

In *Bill Johnson's*, the Board found that an employer had brought a state court libel action against an employee in retaliation for the employee's having previously filed an unfair labor practice complaint against the employer.[11] The Board concluded that the retaliatory lawsuit was an unfair labor practice and, pursuant to its authority under the NLRA, ordered the employer to cease prosecuting the state court action.[12] On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the Board's order.[13] In a unanimous decision the Supreme Court reversed and remanded. The Court held that because of a civil litigant's constitutional right of access to state court, the Board could not order an employer or union to halt a state court action unless the suit was found to be both retaliatory and without merit.[14] The Court then established a new standard that the Board must use in determining whether a retaliatory civil suit is baseless, that is, without merit.[15] Prior to *Bill Johnson's* the Board focused its inquiry on the retaliatory motive of the state court action.[16] Although the Board would also refer to the state court suit's lack of a reasonable basis, such lack of basis was only the means by which the Board inferred a retaliatory motive.[17] Under the new standard established by the Supreme Court in *Bill Johnson's*, however, the Board must consider the merits of the state court action independently of its determination of retaliatory motive.[18] Furthermore, in evaluating the basis of the state court suit the Board is prohibited from deciding genuine issues of material fact or issues of state law.[19]

The problem created by *Bill Johnson's* is that, in an effort to protect the civil litigant's constitutional rights, the Supreme Court has limited the Board's ability to determine the basis of a state court action.[20] This decision may encourage employers and unions to file retaliatory civil suits whenever an unfair labor practice complaint is filed against them because, in all but the most extreme cases, the Board will now be unable to order such suits enjoined.[21] Employers and unions, who have historically been frustrated in their attempts to obtain discovery in Board proceedings, may begin to take advantage of the narrow standard established in *Bill Johnson's* by bringing frivolous civil lawsuits in an

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witnesses' statements under FOIA would be made by employer-respondents in virtually all unfair labor practice proceedings." *Id.* Thus, if employers and unions are willing to bring a separate FOIA suit in federal district court to obtain discovery, it seems likely that they would bring state court suits to accomplish the same thing. *See also* Petition for Cert. of the National Labor Relations Board at 9, *Robbins*.

[11] Bill Johnson's Restaurants, Inc., 249 N.L.R.B. 155, 162-65 (1980).

[12] *Id.* at 169-70.

[13] Bill Johnson's Restaurants, Inc. v. NLRB, 660 F.2d 1335, 1344 (9th Cir. 1981).

[14] *Bill Johnson's*, 103 S. Ct. at 2171.

[15] *Id.* at 2171-73.

[16] *See id.* at 2168; *see also infra* note 196 and accompanying text.

[17] *See infra* notes 197-205 and accompanying text.

[18] *See Bill Johnson's*, 103 S. Ct. at 2173.

[19] *Id.* at 2171.

[20] This is the mandate of *Bill Johnson's*, and, given the constitutional considerations involved, the Court's holding seems legally sound. *See infra* notes 253-58 and accompanying text.

[21] *See Bill Johnson's*, 249 N.L.R.B. at 168. In *Bill Johnson's* the administrative law judge stated:

> It would hardly make sense to allow litigants to gain access to the substance of these statements through the use of state discovery procedures. Such a rule permitting such conduct would certainly promote the filing of suits, meritorious or not, in state court to take advantage of discovery procedures not available to the litigants in a Board proceeding.

Id.

effort to use liberal state court discovery procedures to circumvent the Board's restrictive procedures.[22] Consequently, an indirect result of the Supreme Court's ruling in *Bill Johnson's* is that the purpose and policy of the Board's discovery rules, which the Court had endorsed in *Robbins*, may be undermined.

Because civil litigants have a right to have the merits of their claims adjudicated in state court, the Supreme Court's holding in *Bill Johnson's*, which prohibits the Board from determining the merits of a state court action, is legally sound.[23] Any remedy designed to deal with the procedural loophole created by *Bill Johnson's*, therefore, must maintain the rights of civil litigants.[24] Such a remedy is available if the Board exercises its power pursuant to section 10(j) of the NLRA.[25] Section 10(j) of the NLRA authorizes the Board to petition a federal district court to temporarily enjoin unfair labor practices pending the final outcome of a Board proceeding.[26] Under this provision the Board could seek to enjoin state court suits brought for the purpose of bypassing the Board's discovery rules as unfair labor practices until the Board's initial unfair labor practice hearing concluded.[27] Closing the procedural loophole created by *Bill Johnson's* with a procedural remedy, therefore, would preserve employers' and unions' constitutional right of access to state courts at the same time that it would safeguard employees from intimidation.

This note will begin by detailing the Board's current rules and regulations governing discovery. The note will then discuss the devices used by employers and unions attempting to circumvent the Board's discovery rules and the standard the Board had previously used to enjoin retaliatory state court suits. Next, this note will analyze *Bill Johnson's* and the procedural loophole the decision has created in the Board's discovery procedures. Finally, an alternative procedural approach employing section 10(j) of the NLRA will be proposed. This proposal will not only allow the Board to safeguard its proceedings, but will also preserve the constitutional rights with which the Court was concerned in *Bill Johnson's*.

I. Discovery Before the Board

One of the primary purposes of the NLRA was the establishment of a balance of bargaining power between employers and employees, so as to avoid industrial strife.[28] To accomplish this broad purpose, the NLRA created legally enforceable rights for employees to organize, bargain collectively, and engage in concerted activities.[29] The NLRA also established the Board as an independent administrative agency to interpret and enforce the NLRA.[30] In enforcing the NLRA the Board holds trial type hearings[31] that are subject to the Board's own procedural rules.[32]

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[22] *See infra* notes 285-89 and accompanying text.
[23] *See infra* notes 253-60 and accompanying text.
[24] *See Bill Johnson's*, 103 S. Ct. at 2171-73.
[25] *See* 29 U.S.C. § 160(j) (1982).
[26] *See infra* notes 319-20 and accompanying text.
[27] *Id. See also infra* notes 313-18.
[28] *See* 29 U.S.C. § 151 (1982); *see also* 1 The Developing Labor Law, *supra* note 3, at 28 .
[29] *See* 29 U.S.C. § 157 (1982); *see also* 1 The Developing Labor Law, *supra* note 3, at 28 .
[30] *See* 29 U.S.C. § 153 (1982); *see also* 2 The Developing Labor Law, *supra* note 3, at 1599-1601.
[31] *See* 29 U.S.C. § 160 (1982); *see also* 2 The Developing Labor Law, *supra* note 3, at 1621-22 .
[32] *See* 29 U.S.C. § 156 (1982).

A. *The Board's Discovery Rules*

The Board's procedural rules do not provide for general pre-hearing discovery in unfair labor practice proceedings.[33] Once an allegation of an unfair labor practice is brought by an individual or an organization,[34] the Board's regional office undertakes its own investigation.[35] During this investigation, statements — usually from employees — and other evidence are obtained.[36] The regional director will then determine whether to issue a complaint.[37] If a complaint is issued, it must be specific.[38] The complaint will then be prosecuted by the General Counsel.[39] Despite the Board's general prohibition of pre-hearing discovery, its rules do provide for motions for bills of particulars,[40] depositions,[41] subpoenas,[42] and pre-hearing conferences.[43] Although none of these devices are designed for discovery purposes,[44] employers and unions can use them to gain limited information.[45]

Motions for bills of particulars are allowed for the limited purpose of clarifying a complaint or answer.[46] Depositions, although expressly allowed by the Board's rules,[47] are available only upon a showing of "good cause," and are limited to those situations where there is reason to believe that the witness whose deposition is sought may be unavailable to

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[33] N.L.R.B. Case Handling Manual, *supra* note 3, at ¶ 10292.4. This provision states: "The Federal Rules of Civil Procedure providing for compulsory pretrail discovery have been held not applicable to Board proceedings. They should not be used by the trial attorney; any attempt by the parties to use them should be resisted."

See also 29 C.F.R. §§ 102.117, 102.118 (1983), which describes the material the Board will release, and the material it considers confidential. For a general discussion of these rules see *infra* notes 38-58 and accompanying text.

[34] *See* 29 C.F.R. § 102.9 (1983) (limiting the initiation of unfair labor practices charges to private parties).

[35] 2 THE DEVELOPING LABOR LAW, *supra* note 3, at 1617-18.

[36] *See* N.L.R.B. Case Handling Manual, *supra* note 3, at ¶ 10058.2.

[37] *See* 29 C.F.R. § 102.15 (1983).

[38] *Id.* Section 102.15 provides, in part, that:

> The complaint shall contain (a) a clear and concise statement of the facts upon which assertion of jurisdiction by the Board is predicated, and (b) a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed.

Id.

[39] *See* 2 THE DEVELOPING LABOR LAW, *supra* note 3, at 1621. In response to criticism that the Board operated unfairly as prosecutor, judge, and jury of the NLRA, Congress separated the judicial and prosecutorial functions. *Id.* at 1599-1600. The Board retained the judicial function, and a new official, designated as General Counsel, was created to handle the investigative and prosecutorial functions. The Board is, therefore, "a single enforcement agency with authority divided between two independent units." *Id. See also* 29 U.S.C. § 153(d) (1982) (setting out the General Counsel's authority).

[40] 29 C.F.R. §§ 102.24-102.28 (1983).

[41] 29 C.F.R. § 102.30.

[42] 29 C.F.R. § 102.31.

[43] 29 C.F.R. § 102.35(g).

[44] *See supra* note 33.

[45] *See infra* notes 46-58 and accompanying text.

[46] *See* N.L.R.B. Case Handling Manual, *supra* note 3, at ¶¶ 10292.1, 10292.2.

[47] 29 C.F.R. § 102.30 (1983).

testify at the hearing.[48] The Board's rules also prohibit any of its employees from producing any "files, documents, reports, memoranda, or records of the Board or of the general counsel" unless production is required by the Freedom of Information Act or authorized in writing by the Board.[49] This general prohibition is tempered, however, by a right of access to pre-trial statements given by a witness who actually testifies at the hearing.[50] Nevertheless, these statements need only be produced after the completion of the witness' direct testimony.[51] Employers and unions, therefore, have no right to discover witness' statements prior to the hearing.[52]

Subpoenas are available to all parties in an unfair labor practice proceeding to compel either the testimony of a witness or the production of information.[53] While the use of subpoenas by the Board to compel evidence from an employer or union prior to a hearing has been universally upheld,[54] subpoenas have not been effective in compelling testimony of Board employees, or in obtaining materials from the Board's files.[55] The Board's rules also authorize the administrative law judge ("ALJ") to hold pre-hearing conferences[56] designed to "avoid surprise" and "simplify the issues."[57] Moreover, the ALJ has the authority to conduct the hearing in intervals,[58] granting employers and unions extra time to prepare defenses.

In addition to the specific procedures provided under the Board's rules, the Board and courts have recognized that employers or unions have the right to interrogate

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[48] 29 C.F.R. § 102.30 does not expressly preclude the use of depositions for discovery; however, the N.L.R.B. Case Handling Manual, *supra* note 3, at ¶ 10352.1, provides that, "depositions may not be used merely for the purpose of pretrial discovery." *Id.*

For a discussion of the United States federal circuit courts' views on the Board's interpretation, see *infra* notes 112-35 and accompanying text.

[49] 29 C.F.R. § 102.118(a); *see also* Title Guarantee Co. v. NLRB, 534 F.2d 484, 487 (2d Cir. 1976).

[50] 29 C.F.R. § 102.118(b). This rule is tailored after the *Jencks* rule. In Jencks v. United States, 353 U.S. 657, 668-69 (1957), the United States Supreme Court held that in a criminal action, a defendant is entitled to the prior statements made by a witness once that witness has testified. The Court's rationale rested on the impeachment value of the statements for cross examination purposes. *Id.* at 667. In NLRB v. Adhesive Products Corp., 258 F.2d 403, 408-09 (2d Cir. 1958), the Second Circuit applied the *Jencks* rule to Board proceedings. The Board subsequently accepted this rule in Ra-Rich Mfg. Corp., 121 N.L.R.B. 700, 701-02 (1958). *See also* Maubeck Baking Co., 130 N.L.R.B. 1186, 1190 (1961).

[51] *See* 2 THE DEVELOPING LABOR LAW, *supra* note 3, at 1626.

[52] *Id.*

[53] 29 C.F.R. § 102.31 (1983).

[54] *See* North American Rockwell Corp. v. NLRB, 389 F.2d 866, 872 (10th Cir. 1968); Storkline Corp. v. NLRB, 298 F.2d 276, 277 (5th Cir. 1962); NLRB v. Anchor Rome Mills, Inc., 197 F.2d 447, 449 (5th Cir. 1952); NLRB v. British Auto Parts, Inc., 266 F. Supp. 368, 372 (C.D. Cal. 1967).

[55] *See* North American Rockwell Corp. v. NLRB, 389 F.2d 866, 871-73 (10th Cir. 1968). (The Board has the authority to formulate its own rules for unfair labor practice hearings, and as § 102.118 of the Board's rules prevented the discovery of evidence held by the Board or its employees, a subpeona which attempted to compel such information is invalid.) *Cf.* NLRB v. Health Tec Division, 566 F.2d 1367, 1371 (9th Cir. 1978). (The administrative law judge is required to make an independent evaluation of the privilege of nondisclosure, and not merely rely on the existence of § 102.118 before quashing a subpoena.)

[56] 29 C.F.R. § 102.35(g) (1983).

[57] *See* N.L.R.B. Case Handling Manual, *supra* note 3, at ¶¶ 10381, 10381.1.

[58] *See* 29 C.F.R. § 102.43 (granting discretion to the administrative law judge to continue the hearing from day to day).

employees to perpare their defenses in an unfair labor practice hearing.[59] In exercising this right, however, the employer or union must explain to the employee the purpose of the questioning, and obtain the employee's voluntary participation.[60] Further, the questioning must occur in a context free from hostility and cannot be coercive in nature.[61] Finally, the questions cannot exceed the legitimate purpose of the interrogation by prying into extraneous matters, or by interfering with the employee's rights under the NLRA.[62] To enforce this limitation on the scope of the questioning, the Board has taken the position that an employer or union violates section 8(a)(1) of the NLRA[63] by interrogating an employee with the intent to learn whether the employee gave a statement to a Board investigator, or by asking the employee for a copy of such a statement.[64]

The Board's policy of restricting pre-hearing discovery stands in direct contrast to the liberal discovery provisions contained in the Federal Rules of Civil Procedure,[65] and a majority of the states that have adopted discovery procedures similar to those of the Federal Rules.[66] The scope of discovery contemplated by the Federal Rules of Civil Procedure is extremely broad.[67] Unlike the Board, which provides for only a limited form of depositions,[68] the Federal Rules provide flexible devices for oral[69] and written[70] depositions, interrogatories,[71] production of documents,[72] physical examinations,[73] and requests for admissions.[74] These Federal Rules are premised on the goals of eliminating surprise,[75]

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[59] *See* Joy Silk Mills, Inc. v. NLRB, 185 F.2d 732, 743 (D.C. Cir. 1950); Montgomery Ward & Co., Inc., 146 N.L.R.B. 76, 79-80 (1964); May Department Stores Co., 70 N.L.R.B. 94, 95 (1946).

[60] *See* Johnnie's Poultry Co., 146 N.L.R.B. 770, 775 (1964), *enforcement denied*, 344 F.2d 617 (8th Cir. 1965). The Eighth Circuit's reversal of the Board's decision in *Johnnie's Poultry* was based on the quantum of evidence, and, therefore, other courts have not regarded the Eighth Circuit's decision as a rejection of the principle enunciated by the Board. *Id.* at 618-20. *See* Montgomery Ward & Co. v. NLRB, 377 F.2d 452, 456 (6th Cir. 1967); NLRB v. Neuhoff Bros. Packers, Inc., 375 F.2d 372, 378 (5th Cir. 1967).

[61] Johnnie's Poultry Co., 146 N.L.R.B. 770, 775 (1964), *enforcement denied*, 344 F.2d 617 (8th Cir. 1965).

[62] *Id.*

[63] 29 U.S.C. § 158(a)(1) (1982). This section makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 [right to organize and collectively bargain] of this title." *Id.*

[64] *See* W. T. Grant Co., 144 N.L.R.B. 1179, 1180 (1963); Winn-Dixie Stores, Inc., 143 N.L.R.B. 848, 849 (1963).

[65] The discovery provisions of the Federal Rules of Civil Procedure are set out in rules 26-37, FED. R. CIV. P. 26-37.

[66] *See Development in the Law — Discovery*, 74 HARV. L. REV. 940, 950 (1961); Wright, *Procedural Reform in the States*, 24 F.R.D. 85, 86-88 (1959). Because a majority of states have discovery provisions similar to the Federal Rules, this note will contrast the Board's discovery rules to those of the Federal Rules of Civil Procedure. For an indepth comparison of the Board's rules and the discovery rules of federal procedure, see Comment, *NLRB Discovery Practice: The Applicability of the Discovery Provisions of the Federal Rules of Civil Procedure*, 1976 B.Y.U. L. REV. 845, 864-74.

[67] C. WRIGHT, THE LAW OF FEDERAL COURTS 543 (4th ed. 1983).

[68] *See supra* notes 47-48 and accompanying text.

[69] FED. R. CIV. P. 30; *see also* C. WRIGHT, THE LAW OF FEDERAL COURTS 566-74 (4th ed. 1983) [hereinafter cited as C. WRIGHT].

[70] FED. R. CIV. P. 31; *see also* C. WRIGHT, *supra* note 69, at 574-75.

[71] FED. R. CIV. P. 33; *see also* C. WRIGHT, *supra* note 69, at 575-83.

[72] FED. R. CIV. P. 34; *see also* C. WRIGHT, *supra* note 69, at 584-87.

[73] FED. R. CIV. P. 35; *see also* C. WRIGHT, *supra* note 69, at 588-92.

[74] FED. R. CIV. P. 36; *see also* C. WRIGHT, *supra* note 69, at 592-95.

[75] *See* United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958).

allowing both sides of the controversy to become adequately prepared for trial,[76] and providing a fuller and more balanced disclosure of facts.[77] Although abuses of discovery are a problem,[78] the benefits of a liberal discovery practice are generally recognized as being greater than the drawbacks.[79]

The Board, on the other hand, justifies its restrictive discovery policy by reasoning that witnesses in labor litigation are especially susceptible to retaliation and coercion because of the unique nature of the employer-employee or union-employee relationship.[80] Consequently, the Board has exercised its rulemaking discretion[81] under section 6 of the NLRA[82] to strike a balance in favor of protecting the rights of the employees over the competing interest of providing employers and unions with the right of open discovery.[83] According to the Board, its limited discovery procedures adequately protect the rights of all parties.[84] The Board maintains that employees would be unwilling to cooperate in investigations and that they would not give candid statements if they knew that their statements could be obtained by their employer or union prior to the hearing.[85] Furthermore, the Board takes the position that discovery would delay unfair labor practice proceedings, and interfere with the Board's role in carrying out the NLRA.[86]

B. Robbins *and the Judicial View of Discovery before the Board*

The United States Supreme Court supported the Board's position on pre-hearing discovery in *National Labor Relations Board v. Robbins Tire & Rubber Co.*[87] In *Robbins*, the Court held that pre-hearing witness statements were exempt from disclosure under the Freedom of Information Act ("FOIA")[88] until the completion of the Board's unfair labor

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[76] *See* C. WRIGHT, *supra* note 69, at 540.

[77] One of the underlying purposes of the federal discovery rules is to eliminate the "sporting theory of justice." *See* Tiedman v. American Pigment Corp., 253 F.2d 803, 808 (4th Cir. 1958); *see also Development in the Law — Discovery*, 74 HARV. L. REV. 940, 945 (1961).

[78] *See* C. WRIGHT, *supra* note 69, at 541-42, 560-66.

[79] *Id.* at 540.

[80] *See* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 239 (1978); NLRB v. Lizdale Knitting Mills, Inc., 523 F.2d 978, 980 (2d Cir. 1975); NLRB v. National Survey Service, Inc., 361 F.2d 199, 206 (7th Cir. 1966), *cert. denied*, 368 U.S. 823 (1961).

[81] For cases supporting the Board's rulemaking discretion in the area of discovery, *see* NLRB v. Valley Mold Co., Inc., 530 F.2d 693, 695 (6th Cir. 1976); D'Youville Manor, Lowell, Mass., Inc. v. NLRB, 526 F.2d 3, 7 (1st Cir. 1975); NLRB v. Interboro Contractors, Inc., 432 F.2d 854, 858 (2d Cir. 1970); Electromec Design and Development Co., Inc. v. NLRB, 409 F.2d 631, 635 (9th Cir. 1969).

[82] 29 U.S.C. § 156 (1982). This provision provides: "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed . . . , such rules and regulations as may be necessary to carry out the provisions of this subchapter." *Id.*

[83] The Board's authority to strike difficult balances in labor policy has been recognized by the Supreme Court. *See* NLRB v. Truck Drivers Local 449, 353 U.S. 87, 96 (1957). In *Truck Drivers*, the Court stated: "The function of striking [the] balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress has committed primarily to the National Labor Relations Board, subject to limited judicial review." *Id.*

[84] *See* Capital Cities Communications, Inc. v. NLRB, 409 F. Supp. 971, 977 (N.D. Cal. 1976); Ronald Hackenberger, 236 N.L.R.B. 1065 (1978); Mid-West Paper Products Co., 223 N.L.R.B. 1367 (1976).

[85] *See* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 240 (1978); NLRB v. National Survey Service, Inc., 361 F.2d 199, 206 (7th Cir. 1966), *cert. denied*, 368 U.S. 823 (1961).

[86] *See* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 237-38 (1978).

[87] 437 U.S. 214 (1978).

[88] 5 U.S.C. § 552 (1982). Originally passed in 1976, the FOIA is a comprehensive disclosure statute designed to allow citizens to obtain information collected by administrative agencies, unless

practice proceedings.[89] Although the Supreme Court's decision in *Robbins* was limited to witness statements in the context of a FOIA request,[90] because the Board claimed that the release of witness statements would interfere with its enforcement proceedings,[91] the Court's resolution of the issue involved a general examination of the Board's discovery practice.[92]

In *Robbins*, the Board issued an unfair labor practice complaint against an employer for alleged interference with the protected rights of its employees stemming from a contested union representation election.[93] Invoking the FOIA, the employer requested copies of all statements of potential witnesses obtained by the Board during its investigation.[94] The Board refused to disclose this information arguing that the statements were part of its investigatory record compiled for law enforcement purposes and, therefore, were exempt from disclosure under the FOIA.[95] Subsequently, the employer sued the Board in federal district court seeking to compel the release of these statements.[96] The Fifth Circuit Court of Appeals affirmed a district court decision ordering the Board to deliver the statements.[97] Viewing the disclosure question in the context of the Board's discovery procedures,[98] the appeals court reasoned that the Board had the burden of

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the documents requested fall into one of nine statutory exceptions. 5 U.S.C. § 552(b) (1)-(9). *See* 1 K.C. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 5:1-5:3 (1978).

[89] *Robbins*, 437 U.S. at 236.

[90] The Court refused to give its "view as to the validity of the Fifth Circuit's approach to Board discovery." *Id.* at 237 n.16. For Fifth Circuit's view as contrasted to majority of other circuits, *see infra* notes 123-35 and accompanying text.

[91] *Id.* at 216.

[92] *Id.* at 236. The Court stated:

> The remaining question is whether the Board has met its burden of demonstrating that disclosure of the potential witnesses' statements at this time "would interfere with enforcement proceedings." A proper resolution of this question requires us to weigh the strong presumption in favor of disclosure under FOIA against the likelihood that disclosure at this time would disturb the existing balance of relations in unfair labor practice proceedings, a delicate balance that Congress has deliberately sought to preserve and that the Board maintains is essential to the effective enforcement of the NLRA.

Id. The Court then launched into an inquiry of the rationale for the Board's restrictive discovery practice. *Id.* at 236-42.

[93] *Id.* at 216. Upon a petition filed by the Aluminum Workers International Union, AFL-CIO (the Union), the Board conducted a representation election among a unit of employees of the Robbins Tire & Rubber Co. *See* Brief for the NLRB at 4-5, *Robbins*. The Union received 244 votes, while 248 were cast against it, 10 ballots were challenged. *Id.* at 4. The Union filed objections, alleging that the employer had interfered with the election. *Id.* at 4-5. The Board issued an unfair labor practice complaint against the employer for alleged violations of section 8(a)(1) of the NLRA, including (1) interrogating employees about their union activities; (2) promising benefits if the employees rejected the Union; and (3) threatening to discharge employees if the Union was elected. *Id.* at 5.

[94] *Robbins*, 437 U.S. at 216.

[95] *Id.* at 216-17. Exemption 7(A) of the FOIA provides that disclosure is not required of "matters that are . . . investigatory records compiled for law enforcement purposes, but only to the extent that production of such records would . . . interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A) (1982).

[96] 437 U.S. at 217.

[97] Robbins Tire & Rubber Co. v. NLRB, 563 F.2d 724, 733 (5th Cir. 1977).

[98] *Id.* at 726. The court stated: "This is a Freedom of Information Act (FOIA) case, although it takes on the troubling coloration of a dispute about the discovery rights of respondents in National Labor Relations Board proceedings." *Id.*

demonstrating that witness intimidation was likely to occur in specific cases. Absent a demonstration of such intimidation, the court concluded, there was no blanket exemption from the FOIA for witness statements obtained in the course of Board investigations.[99] The Supreme Court granted the Board's petition for certiorari[100] and reversed the Fifth Circuit, holding that witness statements were exempt from disclosure under the FOIA and that no particularized showing of employee intimidation was required.[101]

The *Robbins* Court recognized that a "profound alteration" in unfair labor practice proceedings would result if witnesses' statements were disclosed prior to a Board hearing.[102] Interpreting the FOIA as a statute designed to deal with agency disclosure in general, the Court refused to allow the statute to be used as a means to undercut the Board's authority to control its unfair labor practice proceedings.[103] The Court emphasized the significant potential for employers or unions to use discovery as a means of coercing employees in an effort to discourage employees from exercising their statutory rights.[104] Recognizing that the effectiveness of the NLRA depends upon employee cooperation,[105] the Court was unwilling to overrule indirectly the Board's "long tradition" of prohibiting pre-hearing discovery[106] in unfair labor practice proceedings.

The *Robbins* Court was also conscious of the Board's Congressional mandate to interpret the NLRA, and of the balance the Board must strike in dealing with labor disputes.[107] Absent a congressional directive to the contrary, the Court refused to interfere with the Board's discretion to control unfair labor practice proceedings.[108] In a

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[99] *Id.* at 732.

[100] NLRB v. Robbins Tire & Rubber Co., 434 U.S. 1061 (1978). The Fifth Circuit's decision in *Robbins* was in conflict with the weight of circuit authority. *Robbins*, 437 U.S. at 219 n.5. While the United States Court of Appeals for the Fourth Circuit had taken a position similar to the Fifth Circuit, *see* Charlotte-Mecklenburg Hospital Authority v. Perry, 571 F.2d 195, 200-02 (4th Cir. 1978) (a case involving witnesses' statements obtained during a pending Equal Employment Opportunity Commission investigation), the majority of circuits had followed the approach of the Second Circuit in Title Guarantee Co. v. NLRB, 534 F.2d 484, 491-92 (2d Cir. 1976), *cert. denied*, 429 U.S. 834 (1976). The decisions that followed the Second Circuit include: Abrahamson Chrysler-Plymouth, Inc. v. NLRB, 561 F.2d 63, 64-65 (7th Cir. 1977); NLRB v. Hardeman Garment Corp., 557 F.2d 559, 563 (6th Cir. 1977); Harvey's Wagon Wheel, Inc. v. NLRB, 550 F.2d 1139, 1142-43 (9th Cir. 1976); New England Medical Center Hospital v. NLRB, 548 F.2d 377, 385-87 (1st Cir. 1976); Climax Molybdenum Co. v. NLRB, 539 F.2d 63, 65 (10th Cir. 1976); Roger J. Au & Son v. NLRB, 538 F.2d 80, 83 (3d Cir. 1976).

[101] *Robbins*, 437 U.S. at 236.

[102] *Id.* at 237.

[103] *Id.* at 238-39.

[104] *Id.* at 239. The Court stated: "The most obvious risk of 'interference' with enforcement proceedings in this context is that employers or, in some cases, unions will coerce or intimidate employees and others who have given statements, in an effort to make them change their testimony or not testify at all." *Id.*

[105] *Id.* at 240. The Court stated: "Furthermore, both employees and nonemployees may be reluctant to give statements to NLRB investigators at all, absent assurances that unless called to testify in a hearing, their statements will be exempt from disclosure until the unfair labor practice charge has been adjudicated." *Id.*

[106] *Id.* at 239. The Court stated: "Our reluctance to override a long tradition of agency discovery, based on nothing more than an amendment to a statute designed to deal with a wholly different problem, is strengthened by our conclusion that the danger posed by premature release of the statements sought here would involve precisely the kind of 'interference with enforcement proceedings' that Exemption 7(A) was designed to avoid." *Id.*

[107] *See id.* at 238.

[108] *Id.*

concurring opinion, Justice Stevens stated that interpreting the FOIA as authorizing discovery greater than the Board's own rules would be "meddling" in the Board's enforcement proceedings.[109] Thus, despite the limited scope of the issue before the Court,[110] the *Robbins* opinion was a strong affirmation of the Board's discovery policy.[111]

In addition to the Supreme Court's endorsement of the Board's limited discovery rules a majority of the decisions[112] among the circuit courts of appeals that have expressly addressed the issue of pre-hearing discovery before the Board have upheld the Board's position.[113] The United States Court of Appeals for the Second Circuit has consistently held that the Board is not required to provide pre-hearing discovery.[114] In *National Labor Relations Board v. Interboro Contractors, Inc.*,[115] the Board directed an employer to pay certain sums as back pay awards to two employees who had been wrongfully discharged.[116] In granting an enforcement order for the Board, the Second Circuit held first, that the employer had no constitutional right to pre-trial discovery.[117] Second, the court held that section 10(b) of the NLRA, which provides that the Board's proceedings should be conducted in accordance with federal rules of evidence,[118] did not specifically authorize or require the Board to adopt discovery procedures in unfair labor practice hearings.[119]

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[109] *Id.* at 243 (Stevens, J., concurring).

[110] The issue in *Robbins* was whether the FOIA required the Board to disclose witnesses' statements prior to an unfair labor practice hearing. *Robbins*, 437 U.S. at 216. *See also supra* notes 90-92 and accompanying text.

[111] The Board has viewed the Court's decision in *Robbins* as supporting its general denial of pre-hearing discovery. *See* Equitable Life Assurance Society and District 925, Service Employees International Union, 266 N.L.R.B. No. 135, 6 (May 4, 1983); Westinghouse Electric Corp., 239 N.L.R.B. 106, 121 n.76 (1978). The Board reading of *Robbins* as supporting its position on discovery relies on the fact that witness statements are the essential evidence upon which the Board prosecutes cases, and, therefore, it is the information that will be most desirable in discovery. *See* NLRB v. Robbins Tire & Rubber Co. Inc., 437 U.S. 214, 236 (1978). To allow this evidence to be disclosed in deposition or any other device of discovery would be inconsistent with *Robbins*. *See* Bill Johnson's Restaurants, Inc., 249 N.L.R.B. 155, 168 (1980); *see also* Brief for the NLRB at 28-29, *Bill Johnson's*.

[112] The single exception to the general judicial approval of the Board's discovery rules among the circuit courts is the Court of Appeals for the Fifth Circuit. *See* NLRB v. Rex Disposables, Division of DHJ Industries, Inc., 494 F.2d 588, 591-93 (5th Cir. 1974); *see also* NLRB v. Safway Steel Scaffolds Company of Georgia, 383 F.2d 273, 277-78 (5th Cir. 1967); NLRB v. Miami Coca-Cola Bottling Company, 403 F.2d 994, 995-97 (5th Cir. 1968).

[113] *See* Roger J. Au & Son v. NLRB, 538 F.2d 80, 83 (3d Cir. 1976); NLRB v. Valley Mold Co., Inc., 530 F.2d 693, 695 (6th Cir. 1976); D'Youville Manor, Lowell, Mass., Inc. v. NLRB, 526 F.2d 3, 7 (1st Cir. 1975); NLRB v. Interboro Contractors, Inc., 432 F.2d 854, 858-60 (2d Cir. 1970), *cert. denied*, 402 U.S. 915 (1971); North American Rockwell Corp. v. NLRB, 389 F.2d 866, 871-74 (10th Cir. 1968); NLRB v. Vapor Blast Mfg. Co., 287 F.2d 402, 407-08 (7th Cir. 1961); NLRB v. Globe Wireless Ltd., 193 F.2d 748, 751 (9th Cir. 1951).

[114] NLRB v. Interboro Contractors, Inc., 432 F.2d 854, 858 (2d Cir. 1970); *see also* Title Guarantee Co. v. NLRB, 534 F.2d 484, 487 (2d Cir. 1976); NLRB v. Lizdale Knitting Mills, Inc., 523 F.2d 978, 980 (2d Cir. 1975).

[115] 432 F.2d 854 (2d Cir. 1970).

[116] *Id.* at 855.

[117] *Id.* at 857-58.

[118] Section 10(b) of the NLRA provides, in part:

> Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28.

29 U.S.C. § 160(b) (1982).

[119] *Id.* at 859. The Second Circuit's position is consistent with the Board's interpretation. *See supra* notes 33-58 and accompanying text.

Finding no legal requirement for requiring discovery, the appeals court endorsed the Board's rationale for denying discovery.[120] Similarly, a majority of the remaining circuit courts of appeals have held that, because the Board possesses the necessary rule-making power, the decision regarding the circumstances under which discovery will be permitted is a matter committed to the Board's discretion.[121] Although some of these courts have not gone so far as to praise the Board's restrictive policy, these courts have, nonetheless, deferred to its rule-making discretion under the NLRA.[122]

The single exception to the general judicial approval of the Board's discovery rules among the circuit courts is the Court of Appeals for the Fifth Circuit. The Fifth Circuit takes the position that so long as "good cause" is shown, the Board should permit discovery to protect the rights of all parties.[123] Unlike the Second Circuit in *Interboro*, the Fifth Circuit has interpreted section 10(b)[124] of the NLRA and the Board's rules as giving the ALJ discretion to permit the taking of depositions.[125] In *National Labor Relations Board v. Safway Steel Scaffolds Company of Georgia*,[126] the Board sought enforcement of an order finding that a company had violated the NLRA by attempting to undermine a union and refusing to bargain in good faith.[127] As part of its defense to the enforcement action, the company claimed that it had been denied a fair hearing because its request for depositions had been denied.[128] The Fifth Circuit held that the ALJ was wrong in asserting that there was no pre-trial discovery in a Board proceeding[129] and stated that if discovery was practicable, the Board's regulations and section 10(b) of the NLRA permitted discovery.[130] The court found, however, that in the matter before it the denial of the motion for leave to take depositions was a technical error that did not prejudice the company's case.[131] Under the Fifth Circuit's interpretation, therefore, the ALJ's decision to permit discovery is reviewable, and courts can require the Board to allow discovery if the ALJ abuses his discretion.[132] It is important to recognize, however, that even under the Fifth Circuit's view, the discovery available to employers or unions is limited.[133] The Fifth Circuit would permit discovery only under a device provided by the Board's rules, and then, only if the employer or union can show "good cause."[134] Furthermore, as in *Safway*

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[120] *Interboro*, 432 F.2d at 858.

[121] *See* Roger J. Au & Son v. NLRB, 538 F.2d 80, 83 (3d Cir. 1976); NLRB v. Valley Mold Co., Inc., 530 F.2d 693, 695 (6th Cir. 1976); Electromec Design & Development Co. v. NLRB, 409 F.2d 631, 635 (9th Cir. 1969); North American Rockwell Corp. v. NLRB, 389 F.2d 866, 871-72 (10th Cir. 1968); NLRB v. Vapor Blast Mfg. Co., 287 F.2d 402, 407 (7th Cir. 1961).

[122] *See* Electromec Design & Development Co. v. NLRB, 409 F.2d 631, 635 (9th Cir. 1969).

[123] NLRB v. Rex Disposables, Division of DHJ Industries, Inc., 494 F.2d 588, 592 (5th Cir. 1974).

[124] 29 U.S.C. § 160(b) (1982). *See supra* note 118.

[125] NLRB v. Safway Steel Scaffolds Company of Georgia, 383 F.2d 273, 276-77 (5th Cir. 1967). The Second Circuit has interpreted the Board rule § 102.30 as a device to preserve evidence which is not to be used for discovery. *See* Title Guarantee Co. v. NLRB, 534 F.2d 484, 487 (2d Cir. 1976).

[126] 383 F.2d 273 (5th Cir. 1967).

[127] *Id.* at 275-76.

[128] *Id.* at 276.

[129] *Id.* at 277.

[130] *Id.* at 276.

[131] *Id.* at 277.

[132] NLRB v. Rex Disposables, Division of DHJ Industries, Inc., 494 F.2d 588, 591-92 (5th Cir. 1974).

[133] NLRB v. Schill Steel Products, Inc., 408 F.2d 803, 806 (5th Cir. 1969).

[134] *See Rex Disposables*, 494 F.2d at 592.

Steel, in the cases where the denial of discovery has been challenged, the error has never been found to be so prejudicial as to require reversal of a Board decision.[135]

Despite the general judicial approval, the Board's denial of pre-hearing discovery has been widely criticized by commentators.[136] Although these commentators recognize that the Board cannot be legally compelled to adopt a more liberal discovery policy,[137] they argue that the Board's current position is too restrictive.[138] Citing the example of federal courts, these scholars point out that full discovery has been effective in eliminating surprise,[139] as well as in speeding up the trial process.[140] Liberal discovery, it is argued, could offer the same benefits to the Board's proceedings.[141] Although some of these commentators recognize the unique vulnerability of employees,[142] most assert that the Board has given too much protection to employees' interest, and too little protection to the employers' and unions' interests, in obtaining information about the unfair labor practice charges brought against them.[143] Consequently, these critics suggest that the Board should reassess its restrictive discovery rules in order to protect more adequately the rights of employers and unions.

Recognizing the validity of some of this criticism, it remains the Board's difficult responsibility to execute its statutory mandate while at the same time striking a balance in its proceedings.[144] Discovery in labor disputes involves the conflicting need to safeguard employees in the pursuit of their statutory rights, and the need to provide adequate information so employers and unions can prepare their defenses.[145] The Board takes the

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[135] Note, *NLRB Discovery After Robbins: More Peril For Private Litigants*, 47 FORDHAM L. REV. 393, 410 (1978); *see also* NLRB v. Rex Disposables, Division of DHJ Industries, Inc., 494 F.2d 588, 593 (5th Cir. 1974); NLRB v. Safway Steel Scaffolds Company of Georgia, 383 F.2d 273, 277 (5th Cir. 1967); NLRB v. Miami Coca-Cola Bottling Co., 403 F.2d 994, 996 (5th Cir. 1968).

[136] *See* Berger, *Discovery in Administrative Proceedings*, 12 AD. L. REV. 28, 32 (1959) [hereinafter cited as Berger]; Cox, *Adherence to the Rules of Evidence and the Federal Rules of Civil Procedure as a Means of Expediting Proceedings*, 12 AD. L. REV. 51, 155 (1959); Davis, *Revising the Administrative Procedure Act*, 29 AD. L. REV. 35, 44 (1977) [hereinafter cited as Davis]; Gallagher, *Use of Pre-Trial Discovery as Means of Overcoming Undue and Unnecessary Delay in Administrative Proceedings*, 12 AD. L. REV. 44, 47 (1959) [hereinafter cited as Gallagher]; Garvey, *Prehearing Discovery in NLRB Proceedings*, 26 LAB. L. J. 710, 718 (1975) [hereinafter cited as Garvey]; Getman & Goldberg, *The Myth of Labor Board Expertise*, 39 U. CHI. L. REV. 681, 682-7 (1972); Howard, *Discovery Before the National Labor Relations Board — An Unexpanded Concept*, 12 S. TEX. L. J. 112 (1970); Kaufman, *Have Administrative Agencies Kept Pace with Modern Court-Developed Techniques Against Delay? — A Judge's View*, 12 AD. L. REV. 103, 118 (1959-60); Morris, *The Case for Unitary Enforcement of Federal Labor Law — Concerning a Specialized Article III Court and the Reorganization of Existing Agencies*, 26 SW. L. J. 471, 486 (1972) [hereinafter cited as Morris]; Tomlinson, *Discovery in Agency Adjudication*, 1971 DUKE L. J. 89, 100 (1971); Note, *NLRB Discovery After Robbins: More Peril For Private Litigants*, 47 FORDHAM L. REV. 393, 417 (1978) [hereinafter cited as Note, *NLRB Discovery After Robbins*]; Comment, *NLRB Discovery Practice: The Applicability of the Discovery Provision of the Federal Rules of Civil Procedure*, 1976 B. Y. U. L. REV. 845, 858-64 (1976) [hereinafter cited as Comment, *NLRB Discovery Practice*].

[137] *See* Davis, *supra* note 136, at 44-45.

[138] *See supra* note 136.

[139] *See* Berger, *supra* note 136, at 32. Berger argues that discovery in labor proceedings are one-sided because the Board has investigative powers and the authority to subpeona. *Id.*

[140] *See* Morris, *supra* note 136, at 482; Gallagher, *supra* note 136, at 47.

[141] *See supra* notes 139-40.

[142] Comment, *NLRB Discovery Practice*, *supra* note 136, at 864.

[143] Note, *NLRB Discovery After Robbins*, *supra* note 136, at 406; Comment, *NLRB Discovery Practice*, *supra* note 136, at 858-64.

[144] *See* Manoli & Joseph, *The National Labor Relations Board and Discovery Procedures*, 18 AD. L. REV. 9, 11 (1966).

[145] *See supra* notes 80-86.

position that the balance it has struck in favor of limiting discovery is equitable.[146] Furthermore, the judiciary has, for the most part, unequivocally supported this position. As a result, however, both employers and unions have historically sought to circumvent the Board's discovery prohibition in search of additional pre-hearing information.[147]

II. Devices Used to Circumvent the Board's Discovery Rules

A. *The Use of Board Procedural Rules and Suits in Federal District Court*

Dissatisfied with the Board's restrictive rules, and eager to obtain information, employers and unions have used a number of devices and tactics to gain additional pre-hearing discovery.[148] Because the Board's agents investigate all unfair labor practice charges and the employees themselves have little physical evidence,[149] respondents to a Board complaint are generally seeking information possessed by the Board.[150] One way employers and unions have sought to obtain information is through devices available under the Board's rules.[151] Bills of particulars, permitted under the Board's rules to clarify the complaint,[152] have been used to request the names of witnesses and the nature of their testimony.[153] Subpoenas have been employed to compel the General Counsel to disclose any and all evidence inconsistent with the evidence presented at the hearing.[154] Depositions, allowed under the Board's rules for the purpose of preserving evidence for the hearing,[155] have been sought for general discovery purposes.[156] The Board has consistently and successfully resisted such attempts asserting that its rules and regulations allowing such procedures are available only to provide employers and unions with the information they need to receive a fair hearing. In addition the Board maintains that its rules are not intended to provide the full discovery available in a civil suit.[157]

Another tactic used by respondents to obtain discovery was to sue the Board in federal district court.[158] These suits fell into two general categories.[159] The first category involved suits brought by respondents in Board proceedings seeking to enjoin the Board action until their requested information was made available.[160] Plaintiffs in these actions relied upon a theory that the Board's denial of discovery exceeded its statutory authority.[161] The circuit courts, however, have uniformly held that district courts lack jurisdic-

[146] *See* Mid-West Paper Products Co., 223 N.L.R.B. 1367, 1376 (1976). *See also supra* note 84.

[147] *See infra* notes 148-68 and accompanying text.

[148] Note, *NLRB Discovery After Robbins*, *supra* note 136, at 394; Comment, *NLRB Discovery Practice*, *supra* note 136, at 856.

[149] 2 The Developing Labor Law, *supra* note 3, at 1617.

[150] *See* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 236 (1978).

[151] *See* North American Rockwell Corp. v. NLRB, 389 F.2d 866, 871-74 (10th Cir. 1968).

[152] *See supra* note 46 and accompanying text.

[153] *See* Plumbers and Steamfitters Union Local 100, 128 N.L.R.B. 398, 400 (1960), *enforced per curiam*, 291 F.2d 927 (5th Cir. 1961); *see also* North American Rockwell v. NLRB, 389 F.2d 866, 871 (10th Cir. 1968).

[154] North American Rockwell v. NLRB, 389 F.2d 866, 873 (10th Cir. 1968).

[155] *See supra* notes 47-48 and accompanying text.

[156] *See* NLRB v. Interboro Contractors, Inc., 432 F.2d 854, 858 (2d Cir. 1970).

[157] *Id.*

[158] *See Robbins*, 437 U.S. at 217 (FOIA suit); McClain Industries, Inc. v. NLRB, 381 F. Supp. 187, 188-89 (E.D. Mich. 1974) (injunctive suit).

[159] *See supra* note 158.

[160] *See* Vapor Blast Mfg. Co. v. Madden, 280 F.2d 205, 206 (7th Cir. 1960); McClain Industries, Inc., 381 F. Supp. 187, 188-89 (E.D. Mich. 1974).

[161] *McClain Industries*, 381 F. Supp at 189.

tion to hear requests for such injunctions.[162] Suits involving FOIA actions brought against the Board constituted the second, and much larger category.[163] Since the passage of the FOIA in 1967, respondents in Board proceedings have attempted to use its provisions to obtain witness statements and other information.[164] In its petition for certiorari to the United States Supreme Court in *NLRB v. Robbins Tire & Rubber Co.*, the Board predicted that if employers and unions could successfully use the FOIA as a method of discovery, pre-hearing requests for witnesses' statements under the FOIA would be made in virtually all unfair labor practice actions.[165] Although the Supreme Court's decision in *Robbins* eliminated the use of FOIA as a discovery device,[166] thereby terminating this method of circumventing the Board's discovery procedures,[167] the Court's decision in *Bill Johnson's Restaurants, Inc. v. NLRB* has opened a new avenue of "back door" discovery through which employers and unions may be able to circumvent the Board's restrictive discovery procedures.[168]

B. *The Use of State Court Actions For Discovery Purposes*

In *Bill Johnson's*, the Board recognized that state court suits brought by employers or unions against employees after the employees have filed charges with the Board can be used to bypass the Board's limited discovery procedures.[169] State courts generally provide liberal discovery procedures that are similar to the discovery provisions of the Federal Rules of Civil Procedure.[170] Because these civil suits can involve the same labor dispute that gave rise to the unfair labor practice charge,[171] there is significant potential that factual issues will overlap.[172] Under the guise of obtaining information for the state court action employers and unions can use the more lenient state court discovery procedures to obtain information that is really related to the Board's proceedings.[173] To maintain its discovery procedures and to protect employees from intimidation, it had been the Board's

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[162] McClain Industries, Inc. v. NLRB, 521 F.2d 596, 597 (6th Cir. 1974); NLRB v. Vapor Blast Mfg. Co., 280 F.2d 205, 208 (7th Cir. 1961); *see also* In re NLRB (Grey Concrete Products, Inc.), 109 L.R.R.M. 3203, 3204 (11th Cir. 1982).

[163] *See Robbins*, 437 U.S. at 219 n.5.

[164] *See* Garvey, *supra* note 136, at 710; Comment, *NLRB Discovery Practice*, *supra* note 136, at 856.

[165] Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit 9, *Robbins*.

[166] *See Robbins*, 437 U.S. at 242-43.

[167] *See id.* at 237.

[168] *See Bill Johnson's*, 249 N.L.R.B. at 166 (1980).

[169] *Id.*

[170] *See* Wright, *Procedural Reform in the States*, 24 F.R.D. 85, 86-88 (1959); *Developments in the Law — Discovery*, 74 HARV. L. REV. 940, 950 (1961); *see also supra* note 66.

[171] *See* Sheet Metal Workers' Union Local 355, 254 N.L.R.B. 773, 779 (1981), *enforced in part and enforcement denied in part*, 716 F.2d 1249 (1983); The United Credit Bureau of America, Inc., 242 N.L.R.B. 921, 926 (1979), *enforced*, 643 F.2d 1017 (4th Cir. 1981), *cert. denied*, 454 U.S. 994 (1981); George A. Angle, 242 N.L.R.B. 744, 746 (1979), *enforced*, 683 F.2d 1296 (10th Cir. 1982); Power Systems, Inc., 239 N.L.R.B. 445, 447 (1978), *enforcement denied*, 601 F.2d 936 (7th Cir. 1979).

[172] *See* Sheet Metal Workers Union Local 355 v. NLRB, 716 F.2d 1249 (9th Cir. 1983).

[173] Bill Johnson's Restaurants, Inc., 249 N.L.R.B. 155, 166-67 (1980). The ALJ in *Bill Johnson's* stated: "Respondents' utilization of Arizona's libel [sic] discovery rules to obtain the depositions of its employees in furtherance of a separate state action effectively allows the Respondent to bypass the Board's established procedures and obtain through the back door evidence which was closely associated with the issues in the pending Board hearing." *Id.* at 166.

practice to order frivolous[174] state court actions brought for retaliatory purposes enjoined on the grounds that the suits were unfair labor practices.[175]

Section 8(a)(4) of the NLRA makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony" under the NLRA.[176] To enforce this provision the Board closely scrutinizes civil lawsuits brought by employers or unions against employees who have previously filed charges with the Board.[177] Although the Board has fluctuated on the question of whether the filing of a civil action after an employee has brought an unfair labor practice charge is a *per se* violation of section 8(a)(4),[178] its general rule has been that such lawsuits, by themselves, do not constitute an unfair labor practice.[179] In *Clyde Taylor*,[180] the Board found that an employer violated the NLRA by threatening to file a libel action in state court against employees in retaliation for their filing charges with the Board.[181] The Board refused, however, to find that the same employer had violated the NLRA by obtaining a state court injunction banning employee picketing.[182] The Board reasoned that its enforcement of the NLRA should "accommodate" the rights of parties to litigate their claims in state court.[183]

Pursuant to the *Clyde Taylor* doctrine, the Board has been reluctant to find that either employers or unions violate the NLRA simply by bringing a civil lawsuit subsequent to the filing of an unfair labor practice charge against them.[184] The Board has carved out an exception to the *Clyde Taylor* rule to reach situations where a civil lawsuit has been brought for an unlawful purpose.[185] Under this exception, the Board has ordered suits enjoined

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[174] This note's primary focus is on frivolous or baseless lawsuits brought for the purpose of circumventing the Board's restrictive discovery rules. The problem of meritorious lawsuits, which are only brought for discovery purposes, involve a complicated preemption issue. For a discussion of this problem, see *infra* notes 292, 357.

[175] *See Bill Johnson's*, 249 N.L.R.B. at 168; *see also Power Systems*, 239 N.L.R.B. at 450.

[176] 29 U.S.C. § 158(a)(4) (1982).

[177] *See Sheet Metal*, 254 N.L.R.B. at 779.

[178] *See* W.T. Carter & Brother, 90 N.L.R.B. 2020 (1950). In *Carter*, a divided Board held that it was unfair labor action to bring a civil action to enjoin a union from holding organizational meetings in a Company town. *Id.* at 2023. The Board likened the suit to an abuse of process which was brought in bad faith. *Id.* at 2024. This case was subsequently overruled by the Board in Clyde Taylor, 127 N.L.R.B. 103, 109 (1960).

[179] *See* 1 THE DEVELOPING LABOR LAW, *supra* note 3, at 135; *see also* S. E. Nichols Macy Corp., 229 N.L.R.B. 75 (1977); Frank Visceglia, 203 N.L.R.B. 265, 266-67 (1973), *enforcement denied*, 498 F.2d 43, 50 (3d Cir. 1974); United Aircraft Corp., 192 N.L.R.B. 382, 384 (1971), *enforced in part*, 534 F.2d 422, 465 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976); Clyde Taylor, 127 N.L.R.B. 103, 109 (1960); Brief for NLRB at 13, *Bill Johnson's*.

[180] 127 N.L.R.B. 103 (1960).

[181] *Id.* at 108.

[182] *Id.* at 109.

[183] *Id.*

[184] *See* United Credit Bureau, 643 F.2d at 1022-23; *see also* Sullivan and Associates, 230 N.L.R.B. 55 (1975); S.E. Nichols Macy Corp., 229 N.L.R.B. 75 (1977); Retail Clerks Union Local No. 770, 218 N.L.R.B. 680, 683 (1975); Los Angeles Building and Construction Trades Council, AFL-CIO, 217 N.L.R.B. 946, 948 (1975); Frank Visceglia, 203 N.L.R.B. 265, 266-67 (1973); United Aircraft Corp., 192 N.L.R.B. 382, 384 (1971).

[185] *See* Power Systems, Inc., 239 N.L.R.B. 445, 449 (1978), *enforcement denied*, 601 F.2d 936, 940 (7th Cir. 1979); United Standford Employees, Local 680, 232 N.L.R.B. 326 (1977); Television Wisconsin, Inc., 224 N.L.R.B. 722, 778-80 (1976); International Organization of Masters, Mates and Pilots, 224 N.L.R.B. 1626, 1627 (1976), *aff'd*, 575 F.2d 896, 907 (D.C. Cir. 1978); West Point Pepperell, Inc., 200 N.L.R.B. 1031 (1972); *see also* 1 THE DEVELOPING LABOR LAW, *supra* note 3, at 135.

that it determines to have been brought either to punish the employee,[186] or to bypass the Board's discovery rules.[187]

The Board first announced its exception to the *Clyde Taylor* doctrine in *Power Systems Inc.*[188] In that decision the Board found that an employer had violated sections 8(a)(1) and (4) of the NLRA by filing a state court action against its former employee.[189] The employer alleged that the employee had maliciously filed a meritless charge with the Board.[190] Finding that the employee had probable cause for filing the charge, and that the evidence upon which the employer had relied was insufficient to support its claim,[191] the Board concluded that the employer's suit had no "reasonable basis."[192] Consequently, the Board reasoned that the suit could only have been brought for the illegal purpose of penalizing the employee.[193] The Board pointed out that the immediate cost of hiring counsel to defend the civil suit, along with the threat of substantial damages, economically punished the employee.[194] Moreover, the Board recognized that retaliatory civil suits had the effect of discouraging other employees from seeking access to the Board's process.[195]

In *Power Systems* and the Board decisions that have followed this exception to the *Clyde Taylor* rule,[196] the Board's primary concern was the retaliatory nature of the state court action.[197] Although the Board used the lack of reasonable basis in the civil suit as the grounds for ordering such suits enjoined, the determination of the lack of basis of such suits was only the means by which the Board ascertained whether such a retaliatory purpose existed.[198] In effect an unlawful retaliatory purpose could be inferred by a lack of

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[186] Power Systems, Inc., 239 N.L.R.B. 445, 450 (1978), *enforcement denied*, 601 F.2d 936, 940 (7th Cir. 1979).

[187] *Bill Johnson's*, 249 N.L.R.B. at 169.

[188] 239 N.L.R.B. 445 (1978), *enforcement denied*, 601 F.2d 936, 940 (7th Cir. 1979).

[189] *Id.* at 450.

[190] *Id.* at 447. The employee had filed 46 unfair labor practice charges since 1967 although only one charge had been filed against the employer in this case. *Id.* at 446. Twenty-seven of the charges had been withdrawn, thirteen dismissed, four settled, and two led to Board orders. *Id.*

[191] *Id.* at 448-49.

[192] *Id.* at 449.

[193] *Id.* at 450.

[194] *Id.*

[195] *Id.* The Seventh Circuit did not enforce the Board's decision on appeal because it found a lack of substantial evidence to support the Board's holding. Power Systems, Inc. v. NLRB, 601 F.2d 936, 939-40 (7th Cir. 1979). This reversal, however, has not been viewed as discrediting the Board's rationale, and the case has been interpreted as establishing a general rule. *See United Credit Bureau*, 643 F.2d at 1023.

[196] The Board viewed its decision in *Power Systems* as an exception to the *Clyde Taylor* doctrine. *See Power Systems*, 239 N.L.R.B. at 449. The Supreme Court has argued, however, that *Power Systems* was not really an exception, but effectively overruled *Clyde Taylor*. *See Bill Johnson's*, 103 S. Ct. at 2168.

[197] *Bill Johnson's*, 103 S. Ct. at 2168.

[198] The Supreme Court interpreted the Board's *Power Systems* rule as not regarding lack of merit in the employer's or union's suit "as an independent element." *Bill Johnson's*, 103 S. Ct. at 2168. In the Board's decision in *Bill Johnson's*, and the four prior Board decisions under its *Power Systems* rule, however, the Board had concluded that the suits were retaliatory because the state court suits were baseless. *See* Bill Johnson's Restaurants, Inc., 249 N.L.R.B. 155, 165 (1980); Sheet Metal Workers' Union Local 355, 254 N.L.R.B. 773, 780 (1981), *enforced in part and enforcement denied in part*, 716 F.2d 1249 (1983); George A. Angle, 242 N.L.R.B. 744, 747 (1979), *enforced*, 683 F.2d 1296 (10th Cir. 1982); The United Credit Bureau of America, Inc., 242 N.L.R.B. 921, 926 (1979), *enforced*, 643 F.2d 1017 (4th Cir. 1981), *cert. denied*, 454 U.S. 994 (1981); Power Systems, Inc., 239 N.L.R.B. 445, 449-50 (1978), *enforcement denied*, 601 F.2d 936 (7th Cir. 1979). Nevertheless, despite the Board's finding that these suits were baseless, the Supreme Court's interpretation seems reasonable in light of the fact that

reasonable basis in the employer's or union's suit. The Board argued that retaliatory suits violated the NLRA because these suits were "inherently coercive,"[199] and discouraged employees from filing charges.[200] In addition to the general retaliatory effect of such lawsuits, the Board also recognized that these suits enabled the parties to use state court discovery to further intimidate and coerce an employee.[201] Accordingly, the Board argued that civil suits brought for the purpose of circumventing its discovery rules were unfair labor practices.[202] Although the retaliatory suit and the abuse of discovery can constitute separate unfair labor practices,[203] they are related in that the use of state court discovery is unlawful only if the state court action is retaliatory.[204] To prevent the abuse of discovery, therefore, the Board must first be able to enjoin the state court action. Prior to the Supreme Court's decision in *Bill Johnson's*, the Board was able to enjoin a state suit whenever it determined that the civil suit was brought for a retaliatory purpose.[205]

III. The Procedural Effect of *Bill Johnson's*

A. *A New Standard For Enjoining Retaliatory Suits*

In *Bill Johnson's Restaurants, Inc. v. NLRB*, the Supreme Court established a new standard the Board must use in determining whether an action brought in state court subsequent to the filing of an unfair labor practice claim is unlawful. This standard limits the Board's ability to order an employer or union to halt a state court suit.[206] The *Bill Johnson's* decision could create a loophole that will enable employers and unions to side-step the Board's discovery rules.[207]

The complaining party in *Bill Johnson's*, Ruth Helton, was suddenly fired after working for over six years as a waitress at Bill Johnson's Big Apple East Restaurant.[208] On August 9, 1978, the day after her discharge, Helton filed an unfair labor practice charge with the Board alleging that she had been fired because of her efforts to organize a union.[209] After an investigation, the Board issued a complaint.[210] At the same time, Helton

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in all these cases the overall emphasis was on the retaliatory motive and not the merits of the civil suit. In addition, in oral argument before the Supreme Court in *Bill Johnson's*, the Board's counsel would not rule out the possibility that prosecution of a meritorious retaliatory suit might be found to be an unfair labor practice. *See Bill Johnson's*, 103 S. Ct. at 2168 n.8.

[199] Sheet Metal Workers' Union Local 355, 254 N.L.R.B. 773, 780 (1981).

[200] *See* George A. Angle, 242 N.L.R.B. 744, 749 (1978), *enforced*, 683 F.2d 1296 (10th Cir. 1982); United Credit Bureau of America, Inc., 242 N.L.R.B. 921, 927 (1979), *enforced*, 643 F.2d 1017 (4th Cir. 1981), *cert. denied*, 454 U.S. 994 (1981); Power Systems, Inc., 239 N.L.R.B. 445, 450, *enforcement denied*, 601 F.2d 936, 940 (7th Cir. 1979).

[201] *See* Bill Johnson's Restaurants, Inc., 249 N.L.R.B. 155, 165-68 (1980).

[202] *See id.* at 169.

[203] *Id.*

[204] *See infra* notes 261-64 and accompanying text.

[205] *See supra* notes 196-200 and accompanying text.

[206] Bill Johnson's Restaurants, Inc. v. NLRB, 103 S. Ct. 2161, 2171-73 (1983).

[207] *Bill Johnson's*, 249 N.L.R.B. at 165-68.

[208] *Id.* at 157-58.

[209] *Id.* at 158. Helton and other waitresses had considered forming a union since 1975. *Id.* at 157. Concerted efforts were only undertaken, however, in reaction to a meeting held by management on July 25, 1978. *Id.* At that meeting, management had announced a new policy of strict enforcement of company rules and told the waitresses that they had little job security as "they were not worth a dime a dozen," and could be easily replaced. *Id.*

[210] *Id.*

and three co-workers began picketing the restaurant and distributing leaflets explaining their various grievances.[211] On September 25, 1978, the restaurant filed a civil complaint in state court against Helton and the other picketers.[212] The civil suit alleged that the defendants had harassed customers, blocked access to the restaurant, created a threat to public safety, and libeled the restaurant and its management with false statements in the leaflets.[213] At the time the restaurant filed its complaint, it obtained an order to expedite depositions.[214] On October 2, 1978, the attorneys for the restaurant deposed Helton, asking numerous questions about her union activities and the unfair labor practice charge she had brought against the restaurant.[215] Meanwhile, the day after the civil suit was initiated, Helton filed a second charge with the Board alleging that the restaurant had committed a number of additional unfair labor practices in connection with the labor dispute between the waitresses and the restaurant.[216] Among the unfair labor practices alleged in the second complaint, Helton claimed that the restaurant's civil suit was brought in retaliation for her filing charges under the NLRA.[217] The General Counsel issued a complaint based on these charges on October 23, 1978.[218]

After a consolidated hearing on the two unfair labor practice complaints, an administrative law judge held that the restaurant had committed six unfair labor practices during the dispute.[219] Applying the rationale expressed in *Power Systems*, the ALJ concluded that

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[211] *Id.* at 161. The leaflets stated:

> THE NATIONAL LABOR RELATIONS BOARD HAS ISSUED A COMPLAINT AGAINST THE BIG APPLE RESTAURANT, 3757 E. VAN BUREN STREET, FOR UNFAIR LABOR PRACTICES.
>
> The complaint was issued as a result of charges filed by Myrland Helton, a former employee who was fired August 8 after suggesting to other waitresses they should organize a union. Mrs. Helton had been an employee of the Big Apple seven and one half years.
>
> Several other waitresses have quit their jobs to join Mrs. Helton in picketing the restaurant to inform the public of the dispute between the employees and the restaurant's management. Among the waitresses' complaints are the following:
>
> Eight hour shifts with no specified breaks.
>
> No pay for overtime when waitresses were required to remain at their posts until their last customer's check had been paid.
>
> Waitresses threatened with dismissal if they lost any time due to illness over the Christmas holiday season.
>
> Inconsistent management practices.
>
> Unwarranted sexual advances.
>
> A filthy restroom for women employees, with no soap, paper towels, or toilet tissue provided.
>
> EMPLOYEES OF BILL JOHNSON'S BIG APPLE FOR JUSTICE ON THE JOB.

Id. at 162.

[212] *Id.*

[213] *Id.* The complaint sought $500,000 in damages and an injunction preventing the defendants from picketing. *Id.* On November 13, 1978, the defendants filed a counterclaim in the state court alleging abuse of process, malicious prosecution, and libel. *Bill Johnson's* 103 S. Ct. at 2166 n.2. The parties then cross-motioned for summary judgment, and the state court dismissed all claims except the libel claims, which it left for trial. *Id.*

[214] *Bill Johnson's*, 249 N.L.R.B. at 163.

[215] *Id. See infra* notes 261-72 and accompanying text.

[216] *Bill Johnson's*, 103 S. Ct. at 2165-66.

[217] *Id.* at 2165.

[218] *Id.*

[219] Although the Supreme Court stated that the ALJ found seven unfair labor practices, *id.* at 2166, the ALJ actually found six, and the Board amended that finding to include a seventh. *See Bill Johnson's*, 249 N.L.R.B. at 155. The ALJ held:

"on the basis of the record and from [his] observation of the witnesses," the state court action lacked a reasonable basis, and its prosecution was, therefore, retaliatory.[220] On appeal, the Board adopted, with minor exceptions,[221] the ALJ's decision and ordered, *inter alia*, the restaurant to withdraw its state court complaint.[222] The United States Court of Appeals for the Ninth Circuit enforced the Board's order in its entirety.[223] Observing that the case "involved a delicate balance between federal and state interests," the appeals court ruled that the Board's power to enforce the NLRA would be "largely crippled if it could not order the withdrawal of retaliatory lawsuits."[224] The United States Supreme Court granted certiorari to consider the Board's order enjoining the state court action.[225]

The Supreme Court held that the Board could not order the restaurant to refrain from prosecuting its state court suit, regardless of the restaurant's motives, unless the suit also lacked a reasonable basis in fact and law.[226] The Court stated that retaliatory motive, by itself, was insufficient grounds for the Board to halt a state court action.[227] Although the Court recognized that the Board has substantial remedial powers under the NLRA,[228] and that a civil lawsuit could be used for coercive or retaliatory purposes,[229] it concluded that the constitution required that a higher criterion be met before a civil suit could be enjoined.[230] The Court determined that employers' and unions' first amendment right of access to the courts, as well as the states' compelling concern in providing a civil remedy for conduct affecting interests "deeply rooted in local feeling and responsibility,"[231] demanded that the Board find both a retaliatory motive and a lack of reasonable basis before it orders a state suit enjoined.[232]

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1) The restaurant had violated § 8(a)(1) and (3) by discharging Helton because of her union activities. *Id.* at 168.

2) & 3) The restaurant had twice violated § 8(a)(1) and (4) by threatening the picketers with reprisals. *Id.* at 169.

4) The employer had violated § 8(a)(1) and (4) by initiating the lawsuit in order to penalize Helton for filing the unfair labor practice charges. *Id.*

5) The restaurant had violated § 8(a)(1) and (4) by deposing Helton concerning the subject of the pending unfair labor practice proceeding under coercive circumstances, and for the purpose of circumventing the Board's discovery rules. *Id.*

6) The restaurant violated § 8(a)(1) and (4) when it interrogated another waitress, without full consent, about the pending unfair labor practice proceeding. *Id.*

The Board subsequently amended the ALJ's finding (6), concluding that the restaurant had violated the NLRA a second time by interrogating the waitress a second time. *Id.* at 155.

[220] *Bill Johnson's*, 249 N.L.R.B. at 164.

[221] *Id.* at 155. *See supra* note 219.

[222] *Id.* at 170.

[223] Bill Johnson's Restaurants, Inc. v. NLRB, 660 F.2d 1335, 1344 (9th Cir. 1981).

[224] *Id.*

[225] Bill Johnson's Restaurants, Inc. v. NLRB, 103 S. Ct. 2161, 2167 (1983). The Court specifically did not consider the question of the restaurant's attempt to circumvent the Board's discovery rules, or the Board's ruling on this issue. *Id.* at 2167 n.4.

[226] *Id.* at 2173. The Supreme Court chose to adopt the Board's terminology of "rational basis," but limited the Board's authority to determine only whether such a basis exists, and not the actual factual or legal elements of the basis. *Id.* at 2172-73.

[227] *Id.* at 2173.

[228] *Id.* at 2168.

[229] *Id.* at 2169.

[230] *Id.*

[231] *Id.*

[232] *Id.* at 2173. Although the ALJ had held that the civil lawsuit lacked a reasonable basis, the Court interpreted the Board's standard for ordering the state court actions enjoined as essentially

In holding that a meritorious suit, whatever the motive for its filing and prosecution, does not violate the NLRA, the Court emphasized that its conclusion was constitutionally based.[233] The Court stated that a baseless claim is not protected by the first amendment.[234] Similarly, the Court explained that a state's interest in providing a civil remedy for its citizens does not exist in actions that have no merit.[235] The Court, therefore, also held that it is an enjoinable violation of the NLRA for employers or unions to prosecute baseless lawsuits with the intent of retaliating against an employee for filing charges with the Board.[236]

Although concluding that a baseless lawsuit brought for a retaliatory purpose violates the NLRA, the *Bill Johnson's* Court established a strict standard to guide the Board's determination of the requisite lack of a reasonable basis.[237] The Court held that the constitutional rights of a civil litigant and the state's interest in protecting the health and welfare of its citizens required a narrow standard under which the Board is prohibited from determining genuine issues of material fact or issues of state law.[238] The Court, therefore, suggested that the Board look to the summary judgement and directed verdict tests[239] as a way of determining whether the civil lawsuit raises either a genuine issue of material fact that turns on the credibility of witnesses,[240] or an issue of state law.[241] If either exists, the Board has no authority to make findings concerning them.[242] Instead, it must halt the retaliatory unfair labor practice action and allow the state court suit to proceed.[243] Thus, although the Board's reasonable basis inquiry is not limited to the bare pleadings,[244] the Board can only determine whether there is a reasonable basis for a civil suit where the facts are undisputed and the suit deals with established questions of state law.[245] As the civil suit in *Bill Johnson's* involved disputed facts,[246] the Court held that the ALJ had erred by making factual findings and not limiting his inquiry to whether any factual issues existed.[247] The Court, therefore, vacated and remanded the case to the Board so that it could consider the reasonable basis of the employer's suit in light of the Court's new standard.[248]

In a concurring opinion, Justice Brennan stressed that the Court's new reasonable basis standard must be interpreted in light of the basic federalistic structure governing

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focused on the retaliatory motivation and not the merits of the suit. *Id.* at 2168; *see supra* notes 197-98. The Court, therefore, established a new standard that the Board must apply to determine the basis of a civil lawsuit. *Bill Johnon's*, 103 S. Ct. at 2171-73.

[233] *Id.* at 2170.

[234] *Id.*

[235] *Id.*

[236] *Id.* at 2171.

[237] *Id.* at 2171-73.

[238] *Id.* at 2171-72.

[239] *Id.* at 2171 n.11. The Court stated that these tests are almost identical and should be granted "when the evidence is such that without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict." *Id.*

[240] *Id.*

[241] *Id.*

[242] *Id.* at 2171-72.

[243] *Id.*

[244] *Id.* at 2171.

[245] *Id.* at 2171-72.

[246] *Id.* at 2173.

[247] *Id.*

[248] *Id.*

labor disputes.[249] Consequently, Justice Brennan pointed out that the Court's decision in *Bill Johnson's* did not affect the Board's authority to enjoin state court actions that involved issues preempted by federal law.[250] In addition, Justice Brennan observed that the Court's authority to determine the scope of the Board's inquiry in an unfair labor practice hearing was limited by principles of administrative law.[251] Accordingly, Justice Brennan stated that absent a constitutional violation, the Board was free to use any procedural method it deemed appropriate in making its reasonable basis determination.[252]

Bill Johnson's establishes the rule that absent preemption the Board must find both a retaliatory motive and a lack of reasonable basis before ordering an employer or union to cease prosecuting a state court action. In addition, the Board is prohibited from deciding genuine issues of material fact or issues of state law in evaluating the basis of state court suits. Under this new standard, therefore, the Board can no longer focus its inquiry on the retaliatory motive. Instead the Board must consider the merits of the state court suit independently. Such a standard, however, will restrict the Board's ability to halt retaliatory civil suits and the abuses of discovery that can accompany these suits.

B. *The Impact of the* Bill Johnson's *Standard on the Board's Discovery Procedures*

An employer's or union's first amendment right of access to state courts together with the state's interest in providing a civil remedy for internal disputes are compelling considerations that must be weighed in any decision to enjoin a state court proceeding as an unfair labor practice.[253] To focus primarily on retaliatory motivation,[254] as had been the Board's prior practice, involves the constitutional danger of denying legitimate state court claims.[255] The Supreme Court, therefore, was correct in requiring that the Board find both a retaliatory motive and no reasonable basis before ordering an employer or union to halt a civil lawsuit.[256] Nevertheless, in establishing the standard by which the Board is to determine whether the suit has a reasonable basis, the Court has restricted the Board's authority to control labor disputes properly within the Board's jurisdiction.[257] The *Bill Johnson's* standard creates a problem because the Supreme Court, in an effort to protect the employer's or union's constitutional rights, has limited the Board's ability to make factual and legal determinations affecting the state court action.[258] This limiting standard will have the practical effect of curtailing the Board's ability to halt state court suits brought for illegal purposes.[259] Consequently, an employer or union will be able to

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[249] *See id.* at 2174 (Brennan, J., concurring).

[250] *Id.* at 2176 (Brennan, J., concurring).

[251] *Id.* (Brennan, J., concurring).

[252] *Id.* at 2177 (Brennan, J., concurring).

[253] *Id.* at 2169.

[254] *See supra* note 198.

[255] *See Bill Johnson's*, 103 S. Ct. at 2169.

[256] *Id.* at 2173. *See also infra* note 302 and accompanying text.

[257] This restriction has a two-fold nature. The first involves the procedural effect on the Board's discovery rules. The second involves the Board's authority to make substantive legal determinations. *See infra* note 289.

[258] As the Supreme Court recognized in *Bill Johnson's*, if the Board can make determinations of witnesses' credibility, it will, in effect, be deciding the merits of the state court action. *Bill Johnson's*, 103 S. Ct. at 2171-72.

[259] If the Board is prohibited from determining genuine issues of material fact or law involved in a state suit, the majority of retaliatory lawsuits will not be enjoinable. For example, of the five Board decisions under the *Power Systems* rule in which an employer or union was ordered to desist

bring a state court action and utilize state court discovery as a means of circumventing the Board's restrictive discovery rules, and, under the *Bill Johnson's* standard, the Board may be precluded from stopping this abuse.[260]

This problem is best illustrated by the facts that gave rise to the labor dispute in *Bill Johnson's*. Upon filing its complaint in state court, the employer immediately moved to shorten the statutory time for taking depositions.[261] The state court granted this motion, and within a week from the filing of the state court complaint, the employer's attorneys began deposing Helton and other employees.[262] The employees' attorney filed a motion to preclude discovery of matters relevant to the pending unfair labor practice proceeding until after the Board's hearing, arguing that the Board's rules do not permit discovery.[263] The state court initially denied this motion; however, it later modified its ruling to preclude questions about employee statements made to Board investigators.[264] Nevertheless, the state court continued to permit discovery into overlapping substantive issues.[265] Despite the limiting state court order, therefore, the employer's attorneys, in taking depositions, asked numerous questions regarding the nature and extent of Helton's union activities, the identities of other employees involved in such activities, and the extent of management's knowledge of these activities.[266] All of these matters related to the employer's defense in the pending Board action.[267] The employer's attorneys, having obtained the names of other employees who had been involved with Helton in organizing the union, also used this information to unlawfully interrogate another employee.[268]

At the unfair labor practice hearing, the ALJ concluded that the employer's use of state court discovery to explore matters intimately connected with the Board's action, but only tangentially associated with the state suit, was a sufficient basis to find that one of the employer's purposes for bringing the suit was to bypass the Board's established discovery procedures.[269] To maintain control over the Board's procedures, therefore, the ALJ held

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from prosecuting a state action, only one decision was based on a summary judgment rationale which might be upheld under the *Bill Johnson's* standards. *See* George A. Angle, 242 N.L.R.B. 747, 748 n.13 (1979). *See also supra* note 198. In the other four decisions, the ALJ and/or Board made determinations of material issues. *See Sheet Metal*, 254 N.L.R.B. at 778-80, *enforced in part and enforcement denied in part*, 716 F.2d 1249 (9th Cir. 1983). (The Ninth Circuit's decision applied the Supreme Court's *Bill Johnson's* standard); *Bill Johnson's*, 249 N.L.R.B. at 164; *United Credit Bureau*, 242 N.L.R.B. at 925-26; *Power Systems*, 239 N.L.R.B. at 447-50.

[260] *See* Brief for the National Labor Relations Board at 29, *Bill Johnson's*. The Board's counsel stated: "Thus, if an employer may pursue insubstantial litigation in state court in retaliation for an employee's filing of unfair labor practice charges, it could, through the use of state court discovery procedures, achieve the same deleterious result that the Court sought to avoid in *Robbins*." *Id.*

[261] *Bill Johnson's*, 249 N.L.R.B. at 163.

[262] *Id.*

[263] *Id.*

[264] *Id.*

[265] The employer's attorney was thus allowed to ask questions " 'regarding the statements made publicly [by Helton and other employees] in Maricopa County, and the basis for those statements.' " *Id.* Since the leaflets which Helton and the other employees had distributed publicly accused the employer of discharging Helton because of her union activities (the basis of pending unfair labor practice charge) the state court's order had the effect of allowing the employer's attorneys to circumvent the Board's restrictive discovery rules. *Id.* at 162.

[266] *Id.* at 163.

[267] *Id.*

[268] *Id.*

[269] *Id.* This finding was not considered by the Supreme Court in its review. *See Bill Johnson's*, 103 S. Ct. at 2167 n.4.

that the taking of the depositions was an unfair labor practice.[270] Although this ruling was not considered by the Supreme Court in its review,[271] the practical effect of the *Bill Johnson's* reasonable basis standard may be to preclude the Board from enjoining similar future attempts to circumvent its restricted discovery rules.[272] Prior to *Bill Johnson's*, if an employer or union attempted to bring a baseless state lawsuit for the purpose of using the state's liberal discovery procedures to obtain information about a pending unfair labor practice action, the Board could determine that the suit lacked a reasonable basis and order it permanently enjoined.[273] Under the *Bill Johnson's* standard, however, the Board is restricted in its ability to determine if a civil suit has a legitimate basis.[274] Thus, if a civil suit involves any genuine issues of material fact or state law, the Board cannot make any findings concerning these issues, and instead the civil action must be allowed to proceed.[275] Although the unlawful use of state discovery and the initiation of retaliatory lawsuits are distinct unfair labor practices,[276] when the abuse of discovery is accomplished within a civil lawsuit, the Board's only effective mechanism of preventing this abuse is to halt the lawsuit.[277] This connection is apparent for two reasons. The first deals with timing. If the Board must wait until the employer or union begins to use the state discovery procedures to obtain information relating to the Board's proceeding, the intimidation and coercion of employees will have already begun.[278] Even if the employer's or union's civil suit is subsequently dismissed, the chilling effect of the discovery related intimidation will discourage the filing of other unfair labor practice charges, and thereby undermine the self-enforcing mechanism of the NLRA.[279]

The second reason why the Board will only be able to prevent abuses of discovery procedures if it can enjoin the state suit involves complicated notions of federalism and the Board's role in enforcing national labor law policies. If the civil suit is facially valid and factual issues overlap in the state and Board actions, the use of state discovery devices to obtain information associated with the state proceeding cannot automatically be labelled an unfair labor practice.[280] State discovery procedures are an integral part of the state

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[270] *Id.* at 168. The use of the state court discovery to circumvent the Board's rules was a separate holding from the ALJ's conclusion that the state suit was retaliatory and, therefore, an unfair labor practice. *See id.* at 169.

[271] *See Bill Johnson's*, 103 S. Ct. at 2167 n.4.

[272] The Board's counsel in *Bill Johnson's* recognized this problem. *See* Brief for the NLRB at 29, *Bill Johnson's*. *See also supra* note 260.

[273] This is essentially what the Board did in *Bill Johnson's*. *See Bill Johnson's*, 249 N.L.R.B. at 164-68.

[274] *See supra* notes 226-30 and accompanying text.

[275] *See supra* notes 237-48 and accompanying text.

[276] *See Bill Johnson's*, 249 N.L.R.B. at 169. *See also supra* note 270.

[277] *See infra* notes 278-83.

[278] To protect effectively the charging employee and other witnesses from intimidation, the unlawful use of discovery must be prevented before it occurs. If the Board cannot enjoin a frivolous lawsuit, and the employer or union is able to use state court discovery, the damage will already have occurred. *See* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 239-40 (1978).

[279] It is conceivable that, if the employer or union is able to use the state court discovery to pry into pending Board issues, the Board's worst fears could be realized, i.e. the discovery-related intimidation is so effective that the employee will decide to drop his charge or other witnesses will refuse to testify, and the charge cannot be prosecuted. *See id.* at 214.

[280] In *Bill Johnson's* the ALJ was able to find that the employer had committed an unfair labor practice by using the state court discovery procedures because the ALJ had already determined that the civil suit was baseless. *See Bill Johnson's*, 249 N.L.R.B. at 168-69.

law.[281] If the civil suit is presumptively legitimate, the parties to that suit will have a right to use state court procedures.[282] Although the use of state discovery devices will interfere with the Board's proceeding, where the information obtained through state discovery relates to the state claim, the Board will have no grounds for claiming that such conduct is unlawful. Absent the authority to order the civil suit enjoined therefore, employers and unions will be able to take advantage of this procedural loophole, and the only protection afforded an employee will be an after-the-fact unfair labor practice charge.[283]

Employers and unions have historically demonstrated a strong desire to obtain pre-hearing discovery in Board proceedings.[284] Numerous attempts have been made to use the provisions of the FOIA as a door to discovery in unfair labor practice actions.[285] Although most of these attempts have been unsuccessful,[286] *Bill Johnson's* has now opened a new avenue to discovery. In his opinion in *Bill Johnson's*, the ALJ recognized that a ruling that permits litigants to circumvent the Board's discovery procedures will promote the filing of state court suits.[287] Encouraged by the Board's new limited ability to enjoin civil lawsuits, some employers and unions may be willing to bring state court actions for the sole purpose of using state discovery to gain information about a pending Board action.[288] Thus, the desire for discovery could become a motivating factor in the filing of retaliatory lawsuits.[289]

The nature of labor disputes is such that almost every unfair labor practice charge

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[281] *See* Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945). In *York* the Court discussed the distinction between matters of "substance" and matters of "procedure," and although it recognized that the distinction was not always clear cut, matters of "procedure" are generally within the control of the court hearing the dispute. *Id. See also* Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[282] *See* Regan v. Merchants Transfer Co., 337 U.S. 530, 533-34 (1949). In *Regan* the Supreme Court held that where state law conferred a legal right the state statute of limitation governed the life of that right. *Id.* The logical extension of the Court's holding in *Regan*, and other cases following *Erie*, is that state procedures are an important element of a state claim. Consequently, where a state right is being enforced in state court a federal court or administrative agency cannot limit the scope of the state court procedures.

[283] This was the result in *Bill Johnson's*. The employer moved so quickly in seeking discovery that the abuse occurred before the Board had an opportunity to halt it. *See Bill Johnson's*, 249 N.L.R.B. at 163. Consequently, the damaging unfair labor practice occurred and the Board could only bring a charge after-the-fact. *See id.* at 165-68.

[284] *See supra* notes 148-68 and accompanying text.

[285] *See* Garvey, *supra* note 136, at 710; Comment, *NLRB Discovery Practice*, *supra* note 136, at 856.

[286] *See supra* notes 164-68 and accompanying text.

[287] *Bill Johnson's*, 249 N.L.R.B. at 168. The ALJ in *Bill Johnson's* stated: "Such a ruling permitting such conduct would certainly promote the filing of suits, meritorious or not, in state courts to take advantage of discovery procedures not available to litigants in a Board proceeding." *Id.*

[288] Following the United States Court of Appeals for the Fifth Circuit's decision in *Robbins*, in which the appeals court affirmed an order compelling the Board to release witness statements prior to the hearing, over ninety FOIA suits were brought for discovery purposes. Interview with Professor Kenneth B. Hipp, former Deputy Assistant General Counsel for the NLRB (January 8, 1984). [While Assistant General Counsel, Professor Hipp supervised the litigation of these suits.] This demonstrated desire, combined with the expressed fears of the ALJ in *Bill Johnson's*, illustrates the lengths to which litigants will go in their efforts to obtain discovery in a Board proceeding.

[289] *Bill Johnson's* has in essence provided a two-fold motivation to file a retaliatory lawsuit. The first stems from the fact that the suit is now less likely to be enjoined, and is therefore more effective in its retaliatory purpose. The second is that the employer or union will be able to gain access to information about the pending unfair labor practice charge by using state court discovery procedures. The two aspects, however, overlap. Discovery has been recognized as an especially effective means of intimidating and coercing employees and witnesses. Its use for informational purposes will also further the retaliatory purpose. *See supra* notes 80-86 and accompanying text.

filed has the potential to be the grounds for either a civil abuse of process or a libel claim.[290] An employer or union lawyer who wishes to bypass the Board's discovery restrictions, therefore, will not find it difficult to bring a civil suit against an employee who has filed a charge with the Board. In most cases, the civil lawsuit will turn on a factual issue of credibility.[291] Because the Board is prohibited from determining genuine factual issues under the *Bill Johnson's* standard, the state court action will be able to proceed, and the extrinsic utilization of the state court discovery will be unchecked.

A second aspect of the procedural problem with the standard established in *Bill Johnson's* involves a question of federal preemption.[292] Allowing the state court action to

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[290] *See* Power Systems, Inc., 239 N.L.R.B. 445, 447 (1978); George A. Angle, 242 N.L.R.B. 744, 747 (1979). In both these cases the employer alleged that the employee's filing of a charge was an abuse of process and malicious prosecution. *Id. See also* Sheet Metal Workers' Union Local 355, 254 N.L.R.B. 773, 777 (1981); The United Credit Bureau of America, Inc., 242 N.L.R.B. 921, 924 (1979) (where the union alleged that the basis of the employee's charge was fraudulent, and they were damaged thereby). In *Bill Johnson's*, the employer's civil claim arose out of a separate factual basis. Part of what was claimed to be libelous, however, was the publishing of the statement that the employer had fired Helton for union activities. Bill Johnson's Restaurants, Inc., 249 N.L.R.B. 155, 162 (1980).

[291] If the civil suit is based on a claim of malicious prosecution, the employer can charge that the factual grounds for the employee's unfair labor practice charge are false. In this situation the case involves a genuine issue of material fact, i.e., the employee's word against the employer's word. *See, e.g., Sheet Metal Workers*, 716 F.2d 1249, 1264-65 (9th Cir. 1983) (case remanded to Board under *Bill Johnson's* standard). Further, if the suit involves a libel claim, it will most likely involve a credibility question. *See Bill Johnson's*, 103 S. Ct. at 2172 n.12. (Justice White's illustrative example).

[292] The preemption problem involves two levels. The first is a procedural conflict which this paper considers and analyzes. The second is a complicated problem involving federal/state substantive law conflicts. This second problem was not directly involved in *Bill Johnson's*, nevertheless the standard established therein will have an effect on such cases. In *Bill Johnson's*, the employer's state court libel action was factually separate from the question pending before the Board in the unfair labor practice action. *See Bill Johnson's*, 103 S. Ct. at 2165; Brief for Petitioner at 6, *Bill Johnson's*. This separation of factual issues, however, is unusual. Of the five Board decisions that have applied the *Power Systems* rule and ordered an employer or union to halt a state court action, only *Bill Johnson's* involved a state court claim which was factually distinct from the unfair labor practice charge pending before the Board. *See supra* note 198. In *Bill Johnson's*, Helton's unfair labor practice was based on the charge that she was fired for attempting to organize a union. *Bill Johnson's*, 103 S. Ct. at 2165. The employer's civil claim was based on the grounds that Helton and other employees libeled the employer with false statements in leaflets the employees distributed while picketing. *See Bill Johnson's*, 249 N.L.R.B. at 157, 162. In the other four cases decided under the *Power Systems* rule, however, the employers' or unions' state court actions were in the nature of abuse of process actions, and, therefore, depended either upon a determination of the employees' probable cause for filing the charge, *see* George A. Angle, 242 N.L.R.B. 744, 746-47 (1979); Power Systems, Inc., 239 N.L.R.B. 445, 448 (1978); or upon the same factual questions already pending before the Board. *See* Sheet Metal Workers' Union Local 355, 254 N.L.R.B. 773, 779 (1981); The United Credit Bureau of America, Inc., 242 N.L.R.B. 921, 926 (1979). Before the Supreme Court's decision in *Bill Johnson's*, such overlapping factual issues, which were properly before the Board, were determined by the Board and used to decide both the merits of the unfair labor practice charge and the basis of the state court suit. *See Power Systems*, 239 N.L.R.B. at 447-50. Under the *Bill Johnson's* standard, however, the Board can only order a state suit enjoined if the overlapping factual issues are preempted. *See Sheet Metal*, 716 F.2d at 1265 n.16. In cases where the factual issues in the state and Board actions are "intertwined" the issue may be preempted, *see* United Credit of America, Inc. v. NLRB, 643 F.2d 1017, 1026 (4th Cir. 1981); however, as the Board's exclusive jurisdiction over labor issues is narrowly construed, *see* Sears v. Carpenter, 436 U.S. 180, 204-08 (1978), this question will not be clear cut. For example, in Sheet Metal Workers' Local 355 v. NLRB, 716 F.2d 1249 (9th Cir. 1983), the first circuit court case to apply the *Bill Johnson's* standard, the employee alleged that his union had

proceed concurrently with the unfair labor practice action will potentially involve conflicts between state and federal law.[293] Assuming that employers and unions use state court discovery to circumvent the Board's rules, the state court procedures will come into direct conflict with the Board's established procedures.[294] The Board recognized this conflict in *Bill Johnson's* and held that state court discovery should have been preempted to the extent that it went beyond what the Board's rules allowed.[295] Justice Brennan's concurrence in *Bill Johnson's* makes clear that the Board still has authority to enjoin state lawsuits that are substantively preempted by federal law.[296] Nevertheless, it is doubtful whether the existence of the Board's procedure alone, would be a sufficient basis to preempt state discovery procedures in an otherwise valid state court action.[297] State court procedures have been recognized as an integral part of state law, to allow the Board to preempt state discovery rules would seem to turn the *Erie* doctrine on its head.[298] Indeed, as Justice Brennan's concurrence discussed the issue of preemption and concluded that the issues in *Bill Johnson's* were not preempted by federal law,[299] the conflict between the scope of Board and state court discovery is probably an insufficient basis to preempt the use of state court discovery.[300] Where the state action is not substantively preempted,[301] therefore, the Board will be required to apply the *Bill Johnson's* reasonable basis standard before ordering the suit enjoined. Here again, because this standard makes it difficult for the Board to determine the requisite baselessness of a state suit, the practical effect of the Court's opinion will be to preclude the Board from controlling abuses of discovery.

Although the constitutional considerations involved in *Bill Johnson's* requires that the Board be limited in its ability to determine the basis of a state court action,[302] the

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verbally extended the time required to pay his union dues; however, when the employee was fired because his dues were not paid on time, he filed a charge with the Board. The union then brought a state court action alleging that it had not granted the employee an extension. *Id.* The appeals court refused, however, to enforce the Board order even though the court recognized that the factual issues upon which the employee's unfair labor practice charge turned, were the exact issues in question in the union's state court action. *Id.* at 1263.

Because it is not entirely clear how the *Bill Johnson's* standard will affect cases where the factual issues overlap, the standard may have the undesirable result of allowing the Board and a state court to hear and decide the same factual issues concurrently. Although the Board and the state court will be applying their factual determinations to distinct legal questions, different findings could produce complex federalist conflicts.

[293] *See* United Credit Bureau of America, Inc. v. NLRB, 643 F.2d 1017, 1025-26 (4th Cir. 1981). *See also supra* note 292.

[294] *See Bill Johnson's*, 249 N.L.R.B. at 168.

[295] *Id.* The Board's ruling was in the past tense — should have been — because by the time the issue came before the ALJ the abuse of discovery was an accomplished fact. *Id.*

[296] *Bill Johnson's*, 103 S. Ct. at 2176 (Brennan, J., concurring); *see also* Sheet Metal Workers' Local 355 v. NLRB, 716 F.2d 1249, 1265 n.16 (9th Cir. 1983).

[297] *See* Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945); Regan v. Merchants Transfer Co., 337 U.S. 530, 533-34 (1949); *see also supra* notes 281-82.

[298] *See* Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[299] *See supra* note 250.

[300] It is also significant to note that in *Bill Johnson's*, the ALJ made his conclusion of preemption in a case in which he had already determined that the civil suit was without merit. *Bill Johnson's*, 249 N.L.R.B. at 169. Absent this holding, it is unclear as to whether the ALJ's conclusion on preemption would be valid.

[301] Because the Court has narrowly construed federal labor law preemption, substantive preemption will be rare. *See supra* note 292.

[302] Given the litigant's right of access to state court and the state's compelling interest in maintaining domestic peace, it does not seem legally desirable to restructure the *Bill Johnson's*

procedural effect of such a standard leads to the exact result the Court sought to avoid in *Robbins*.[303] In *Robbins*, the Court held that the FOIA, which was designed to deal with disclosure in general, should not affect the Board's discovery rules.[304] If the standard established in *Bill Johnson's*, which was designed to protect litigants' constitutional rights, prevents the Board from enjoining civil litigants from circumventing its discovery procedures, the indirect result of *Bill Johnson's* would be inconsistent with the logic and rationale of *Robbins*.[305] Although the question of discovery was not directly considered in *Bill Johnson's*, the Court was aware that a narrow standard could have procedural ramifications on the Board's discovery rules.[306] To prohibit, in effect, the Board from ordering state suits enjoined leaves an after-the-fact unfair labor practice charge as the sole method of protecting employees from discovery related intimidation. The Court in *Robbins*, however, stated that such post hoc action is "no substitute for a prophylactic rule that prevents the harm to a pending enforcement proceeding which flows from a witness having been intimidated."[307]

The liberal provisions of state court discovery will potentially subject employees to the exact type of intimidation and coercion that the Board's rules are designed to prevent. Indeed, the Court in *Robbins* recognized that abuses of discovery have the potential to create a chilling effect on employees' willingness to pursue their rights under the NLRA.[308] Because the Board must rely upon aggrieved parties to file charges,[309] the enforcement of the NLRA is directly dependent upon the willingness of individuals to bring complaints and give testimony.[310] The broad language of section 8(a)(4) of the NLRA, which makes it an unfair labor practice to discriminate against an employee because he has filed charges or given testimony in a Board proceeding, has been interpreted as "consistent with an intention to prevent the Board's channel of information

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standard. *See Bill Johnson's*, 103 S. Ct. at 2169. The problem that the Court recognized with the Board's earlier *Power Systems* rule was that, in the Board's inquiry into the basis for the civil suit, the Board often had to make findings that were tantamount to determining the merits of the suit. *See id.* at 2166, 2171-72. As in *Bill Johnson's*, where the factual allegations of the civil suit are separate from the factual allegations involved in the unfair labor practice action, constitutional considerations require the Board to be limited in its baselessness inquiry. *Id.* at 2169-70. Even, however, where the factual issues in the civil suit are the same as the factual questions in the unfair labor practice, the Constitution prohibits the Board from determining the overlapping factual issue and applying it so as to determine the basis of the civil suit. *See* Sheet Metal Workers' Local 355 v. NLRB, 716 F.2d 1249, 1263-65 (9th Cir. 1983); *see also supra* note 292.

[303] *See supra* notes 87-111 and accompanying text.

[304] NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 238-39 (1978).

[305] *See Bill Johnson's*, 249 N.L.R.B. at 168. *See also* Brief for the NLRB at 28-29, *Bill Johnson's*.

[306] The central issue in *Bill Johnson's* involved the circumstances under which the Board can order a civil litigant to halt a state court action. *See Bill Johnson's*, 103 S. Ct. at 2165. In making their arguments before the Supreme Court in *Bill Johnson's*, however, both the petitioner and the Board discussed the use of state court discovery to gain information about pending unfair labor practice proceedings. *See* Petitioner's Brief at 7-8, 31, 33-34; NLRB Brief at 28-29.

[307] *Robbins*, 437 U.S. at 239-40. In addition, Justice Powell in *Robbins* recognized that "although the Board may be able to impose post hoc sanctions for interference with its witnesses, these remedies cannot safeguard fully the integrity of ongoing unfair labor practice proceedings." *Id.* at 251 (Powell, J., concurring in part and dissenting in part).

[308] *Robbins*, 437 U.S. at 239. *See also* United Credit Bureau of America, Inc. v. NLRB, 643 F.2d 1017, 1023-24 (4th Cir. 1981).

[309] *See* 29 C.F.R. § 102.9 (1983).

[310] *See Robbins*, 437 U.S. at 240; *Sheet Metal Workers*, 716 F.2d at 1259-60; *United Credit Bureau of America*, 643 F.2d at 1024.

from being dried-up by employer intimidation."[311] To allow employers and unions to frequently and consistently use state court discovery rules to intimidate employees, therefore, opens unfair labor practice proceedings to the precise kind of abuses the National Labor Relations Act was specifically designed to foreclose.[312]

IV. A Procedural Proposal

The dilemma created by a state court suit brought after an unfair labor practice charge has been filed involves balancing the need to safeguard the employer's or union's right to have the civil claim adjudicated in state court,[313] and the need to protect the employee's statutory rights.[314] The problem, as well as the solution, depends largely on the timing of the two actions. The mandate of *Bill Johnson's* is that, absent complete federal preemption, the Board cannot determine any genuine issues of material fact or state law involved in the civil lawsuit.[315] If the state court action proceeds at the same time as the Board's action, however, there is substantial danger that the procedures of the actions will conflict. This danger is especially evident when the allowable scope of discovery before the different tribunals is considered.[316] Such conflicts could be avoided, however, if, while the Board's unfair labor practice hearing was allowed to proceed,[317] the state court action was temporarily enjoined. The NLRA currently provides a procedure that will allow the Board to petition for such temporary relief.[318] Unlike the situation considered by the Supreme Court in *Bill Johnson's*, under this procedure the Board will not be required to determine any material issues affecting the rights of employers or unions because there will be neither a holding on the actual merits of the civil lawsuit itself, nor a permanent injunction.

Section 10(j) of the NLRA authorizes the Board to petition a federal district court to temporarily enjoin an alleged unfair labor practice prior to the Board's hearing.[319] The purpose of section 10(j) is to aid the Board in its efforts to hear and determine unfair labor practice charges by affording interim relief in cases where the Board needs to

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[311] George A. Angle v. NLRB, 683 F.2d 1296, 1300 n.2 (10th Cir. 1982) (*quoting* John Hancock v. NLRB, 191 F.2d 483, 485 (D.C. Cir. 1951)). *See also* NLRB v. Scrivener, 405 U.S. 117, 122 (1972).

[312] *See Bill Johnson's*, 249 N.L.R.B. at 168.

[313] This is the right recognized in *Bill Johnson's*, 103 S. Ct. at 2173.

[314] This is the right recognized in *Robbins*, 437 U.S. at 241.

[315] *Bill Johnson's*, 103 S. Ct. at 2171-72. *See also* Sheet Metal Workers Local 355 v. NLRB, 716 F.2d 1247, 1263-65 (9th Cir. 1983).

[316] *See supra* notes 261-91 and accompanying text.

[317] The unfair labor practice which is allowed to proceed is the initial charge filed prior to the state court action. In situations where the state court suit is believed to be retaliatory and/or an abuse of discovery, a second charge will subsequently be filed. This charge, however, will not proceed but will await the determination of the state court action. *See Bill Johnson's*, 103 S. Ct. at 2171-72.

[318] *See* 29 U.S.C. § 160(j) (1982).

[319] *Id.* The provision states:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

Id.

preserve the status quo and prevent the frustration of the NLRA pending the final outcome of its proceeding.[320] Accordingly, the district court does not decide the merits of the underlying unfair labor practice charge in ruling on a section 10(j) petition.[321] Instead, a district court's inquiry is limited to a determination of whether the Board has "reasonable cause" to believe that the elements of an unfair labor practice are present.[322] Although section 10(j) does not define this "reasonable cause" standard,[323] because the remedy is designed to give quick relief, the evidentiary burden in a section 10(j) proceeding is "relatively insubstantial."[324] The evidence, therefore, is to be viewed in the light most favorable to the Board,[325] and if that evidence could reasonably support a finding that a violation of the NLRA has occurred,[326] the district court may grant the temporary relief it "deems just and proper."[327] The major considerations involved in ruling on a section 10(j) petition are the need to prevent the frustration of the basic remedial purpose of the NLRA, the degree to which the public interest will be affected if the relief is not granted, and the need to restore the status quo.[328]

As employers and unions begin to use the loophole created by *Bill Johnson's*, the Board should be prepared to invoke section 10(j) to prevent the circumvention of its discovery procedures. When an employee files a charge with the Board and the employer or union subsequently brings a state court action against the employee, the Board must be prepared to make a quick administrative determination as to the merits of the suit.[329] This determination could be accomplished if the Board's Regional Directors established procedures to monitor the filing of state court actions after an unfair labor practice complaint has been issued. Under such procedures, the monitored state suits would fall into one of three general categories. First, the Regional Director may determine that the suit is both legitimate in its purpose and reasonably based. In these circumstances, the Regional Director should take no action that interferes with the employer's or union's right to litigate state court claims.[330] Second, the Regional Director may determine that the suit is

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[320] *See* Levine v. C & W Mining Co., 610 F.2d 432, 436 (6th Cir. 1979); Boire v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1189-90 (5th Cir. 1975), *reh'g denied*, 521 F.2d 785, *cert. denied*, 426 U.S. 934 (1976); Herzog v. Parson, 181 F.2d 781, 786 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 810 (1950).

[321] Humphrey v. International Longshoreman's Ass'n, 548 F.2d 494, 497 (4th Cir. 1977); Squillacote v. International Union, United Auto, et. al., 383 F. Supp. 491, 493 (E.D. Wis. 1974); Fusco v. Richard W. Kaase Baking Co., 205 F. Supp. 459, 462 (N.D. Ohio 1962).

[322] *See* Squillacote v. Local 248, Meat & Allied Food Wkrs., 543 F.2d 735, 743 (7th Cir. 1976); Seeler v. Trading Post, Inc., 517 F.2d 33, 36-37 (2d Cir. 1975); *see also* Note, *The Case for Quick Relief: Use of Section 10(j) of the Labor-Management Relations Act in Discriminatory Discharge Cases*, 56 IND. L. J. 515, 532-38 (1981) [hereinafter cited as Note, *The Case for Quick Relief*].

[323] *See* 29 U.S.C. § 160(j) (1976).

[324] Levine v. C & W Mining Co., 610 F.2d 432, 435 (6th Cir. 1979); Squillacote v. Local 248, Meat & Allied Food Wkrs., 543 F.2d 735, 744 (7th Cir. 1976); Squillacote v. International Union, United Auto, et. al., 383 F. Supp. 491, 492-93 (E.D. Wis. 1974); Fusco v. Richard W. Kaase Baking Co., 205 F. Supp. 459, 463 (N.D. Ohio 1962).

[325] *See* Seeler v. Trading Post, Inc., 517 F.2d 33, 37 (2d Cir. 1975)("the Regional Director should be given the benefit of the doubt in a proceeding for 10(j) relief").

[326] *See supra* note 322.

[327] *See* 29 U.S.C. § 160(j) (1982).

[328] *See* Squillacote v. Local 248, Meat & Allied Food Wkrs., 534 F.2d 735, 744 (7th Cir. 1976).

[329] Timing will be essential because once discovery begins in the state court suit, the damage will have been done. Although section 10(j) petitions are designed to be expeditious, any judicial proceeding takes time. *See infra* note 357.

[330] This would be consistent with the Board's established practice under the *Clyde Taylor* doctrine. *See supra* notes 179-83 and accompanying text.

brought for the purpose of circumventing the Board's discovery rules and that the suit is baseless under the *Bill Johnson's* standard. Under these circumstances the Regional Director should issue a second unfair labor practice charge and seek a Board order requiring the employer or union to cease prosecuting the state court action.[331] Third, the Regional Director may believe that the suit is brought for the purpose of circumventing the Board's discovery rules, however, because the suit involves a genuine issue of fact or law, the Board cannot order the suit enjoined under the *Bill Johnson's* standard. Faced with these circumstances, the Regional Director should immediately petition for section 10(j) relief.

Although the Board had petitioned a district court pursuant to section 10(j) in *Bill Johnson's*,[332] the district court denied the injunction because it was under the "erroneous view" that a state suit could never be enjoined.[333] As the Supreme Court in *Bill Johnson's* held that state suits are enjoinable in certain situations,[334] section 10(j) petitions are still viable procedures. Nevertheless, in light of the new reasonable basis standard established by the Supreme Court in *Bill Johnson's*, the Board will have to restructure and adapt its use of section 10(j) to prevent the circumvention of its discovery rules.

The first problem in attempting to use section 10(j) is the Board's historical reluctance to invoke this provision. Traditionally, the Board has never used section 10(j) extensively.[335] Although Congress[336] and commentators[337] have urged the Board to expand the use of section 10(j), the Board has maintained that section 10(j) is to be used with considerable restraint.[338] Accordingly, the Board has invoked its discretionary power under section 10(j) for such unfair labor practices as mass picketing and picket line violence,[339] but it has been reluctant to seek 10(j) relief in other situations.[340] A consequence of the Board's attitude is that a relatively small amount of the Board's resources have been allocated for section 10(j) use.[341] As employers and unions begin to use state court discovery procedures to pry into unfair labor practice proceedings, the Board will have to either greatly increase its use of section 10(j) or allow its discovery rules to be circumvented. Given the intimidating effect that unguarded discovery could have on employees[342] and the substantial chilling effect that such a practice would have on

[331] The Supreme Court authorized the Board to halt state court actions that can be found to be both retaliatory and baseless if such actions do not involve any genuine issue of material fact or state law. *See Bill Johnson's*, 103 S. Ct. at 2171-72.

[332] *Id.* at 2166 n.2.

[333] *See id.* at 2174 n.15.

[334] *Id.* at 2171-72.

[335] *See* Siegel, *Section 10(j) of the National Labor Relations Act: Suggested Reforms for an Expanded Use*, 13 B.C. INDU. C. L. REV. 457, 482 (1972) [hereinafter cited as Siegel]; Note, *Section 10(j) of the National Labor Relations Act: Increased Exercise of Federal Jurisdiction Over Labor Disputes*, 49 U. CINN. L. REV. 415, 438 (1980) [hereinafter cited as Note, *Section 10(j) of the National labor Relations Act*]; Note, *The Case for Quick Relief*, *supra* note 322, at 516.

[336] *See* Labor Reform Act, H.R. 8410, 95th Cong., 1st Sess. (1977). 123 CONG. REC. H32,613 (1977).

[337] *See* Siegel, *supra* note 335, at 482; Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 130-31 (1964); Note, *Section 10(j) of the National Labor Relations Act*, *supra* note 335, at 438; Note, *The Case for Quick Relief*, *supra* note 322, at 539.

[338] Address by NLRB General Counsel Denham, San Francisco Bay Chapter of the Society for the Advancement of Management (October, 1949), *reprinted in*, 23 L.R.R.M. 44, 45 (1949).

[339] *See* Wilson v. UAW, 97 L.R.R.M. 2013 (S.D. Iowa 1977); Hendrix v. Amalgamated Meat Cutters, 95 L.R.R.M. 2706 (D. Neb. 1977).

[340] *See* Note, *The Case for Quick Relief*, *supra* note 322, at 516-17.

[341] *Id.* at 530-31.

[342] *See supra* notes 104-06 and accompanying text.

employee willingness to bring charges,[343] the Board should expand the use of section 10(j), even if this expansion entails a reallocation of its resources.

A second problem with attempting to use section 10(j) as a procedural solution to the loophole created in *Bill Johnson's* will be the unwillingness of certain district courts to grant such temporary relief. Although the standard for granting relief under section 10(j) is "reasonable cause" to believe that the NLRA has been violated,[344] some courts impose additional requirements that the Board must satisfy to show that injunctive relief is just and proper.[345] Thus, in addition to a reasonable cause showing, the Board has been required to demonstrate that the case is of an "extraordinary nature,"[346] or that the section 10(j) injunction is necessary to "prevent irreparable harm."[347] To satisfy these additional requirements, the Board will have to demonstrate that where an initial unfair labor practice charge has been filed and the respondent to that charge brings a state court action, there is substantial danger that the use of state court discovery will interfere with the prosecution of the Board's initial proceeding. Although the Board's primary concern will be the circumvention of its discovery procedures, if it waits until the abuse of discovery actually manifests itself, the interference with its proceedings will already have occurred.[348] The Board will, therefore, have to argue that effective enforcement of the NLRA requires that its procedures be isolated from outside interference.

To make such an argument, the Board will have to show that there is reasonable cause to believe that the civil suit is an unfair labor practice.[349] This showing will require the Board to demonstrate that the state suit is both retaliatory and baseless.[350] A federal court acting pursuant to section 10(j) jurisdiction, however, will not be constrained by the *Bill Johnson's* reasonable basis standard. Because the district court will not actually decide the merits of whether the civil suit is a retaliatory unfair labor practice,[351] it will be free to consider material issues of fact and state law to determine whether there is reasonable cause to believe that the civil suit is baseless.[352] A section 10(j) hearing, therefore, will involve a limited judicial inquiry in which the Board will have to demonstrate that the civil suit possesses the elements of an unfair labor practice. Nevertheless, even if the district court temporarily enjoins the suit, no constitutional rights of employers or unions will be

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[343] *See supra* notes 105-06 and accompanying text.

[344] *See supra* notes 322-28 and accompanying text.

[345] *See infra* notes 346-55.

[346] *See* Minnesota Mining & Mfg. Co. v. Meter, 385 F.2d 265, 270-71 (8th Cir. 1967); *see also* Note, *The Case for Quick Relief*, *supra* note 322, at 534.

[347] *See* McCleod v. General Electric Co., 366 F.2d 847, 850 (2d Cir. 1966), *vacated and remanded*, 385 U.S. 533 (1967); Fuchs v. Steel-Fab, Inc., 365 F. Supp. 385, 387 (D. Mass. 1973).

[348] In *Bill Johnson's* the abuse of discovery transpired before the suit had been enjoined. *See Bill Johnson's*, 249 N.L.R.B. at 163. Although the ALJ subsequently held this abuse to be an unfair labor practice, *id.* at 168, the Supreme Court in *Robbins* recognized that if employees' statutory rights under the NLRA were to be protected, the intimidation associated with discovery must be prevented prior to its occurrence. *Robbins*, 437 U.S. at 239-40.

[349] *See supra* note 322 and accompanying text.

[350] As the Board will be arguing that the retaliatory suit is the temporarily enjoinable unfair labor practice, the Supreme Court's requirements that the suit be both retaliatory in motivation and baseless must still be met. *See Bill Johnson's*, 103 S. Ct. at 2173.

[351] *See supra* note 320 and accompanying text.

[352] An additional advantage of using a section 10(j) remedy is the familiarity that a district court judge has with local state law. Thus, although the district court judges will not actually decide the merits of the unfair labor practice charge, her familiarity with state law will make her a good judge of the basis of the state law claim.

affected, because the merits of the suit will be preserved for determination by a state court after the Board has concluded its initial unfair labor practice proceeding.[353]

The Supreme Court in *Bill Johnson's* specifically left the particular procedures for making the reasonable basis determination "entirely to the Board's discretion."[354] Further, in his concurrence, Justice Brennan stressed that, absent a constitutional violation, the Board is free to structure its proceedings as it sees fit.[355] A section 10(j) injunction would not violate an employer's or union's right of access to state court, nor would it prevent the state from providing a remedy for a dispute that affects its interest.[356] Employing a section 10(j) procedure would isolate the initial unfair labor practice action from outside procedural interference.[357] After the conclusion of the initial unfair labor practice hearing,[358] the civil litigation would resume and proceed to a determination. Then, only if the state court found that the civil suit was baseless would the Board prosecute the retaliatory unfair labor practice charge.[359] The major advantage under this procedure is that the board will control the scope of discovery affecting its unfair labor practice proceeding without violating the employer's or union's state court rights.

A final problem that may undercut the effectiveness of a section 10(j) petition is the unguarded use of discovery in the district court. The discovery provisions of the Federal

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[353] In *Bill Johnson's* the ALJ consolidated Helton's initial unfair labor practice charge with her second charge. *See Bill Johnson's*, 103 S. Ct. at 2166. Where the Board is seeking to prevent the use of state court discovery from interfering with its proceedings, the two unfair labor practice charges will have to be separated. Under the Supreme Court's standard established in *Bill Johnson's*, the Board cannot hold the state court action to be retaliatory unless the suit is found to be baseless. *Id.* at 2173. In most cases, however, this determination will have to be decided by the state court. *See supra* notes 290-91 and accompanying text. The Board will, therefore, have to await the conclusion of the civil claim in state court before prosecuting its retaliatory unfair labor practice charge. *See Bill Johnson's*, 103 S. Ct. at 2171.

[354] *Bill Johnson's*, 103 S. Ct. at 2171 n.11.

[355] *Id.* at 2176 (Brennan, J., concurring). Justice Brennan stated:

> The scope of our review of the procedures the Board uses to accomplish its mission is limited, and the constitutional constraints on them are attenuated. Unless the agency goes beyond its statutory mandate, violates its own procedures, or fails to provide an affected party due process of law, we have no role in specifying what methods it may or may not use in finding facts or reaching conclusions of law and policy.

Id. See also Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 548-49 (1978).

[356] As these were the only constitutional rights the *Bill Johnson's* court recognized, their absence leaves the Board free to structure its proceeding as it sees fit. *Bill Johnson's*, 103 S. Ct. at 2163-71. *See also supra* note 350.

[357] The section 10(j) remedy, however, will only be effective where the civil suit is baseless. Although a meritorious suit that utilizes state court discovery to pry into a Board proceeding may be an unfair labor practice, enjoining the abuse before it occurs will be very difficult. *See Bill Johnson's*, 249 N.L.R.B. at 162. *See also supra* note 270. Moreover, where the issues involved in the civil suit overlap with the issues involved in the unfair labor practice action, it is not entirely clear whether the Board can enjoin the use of state court discovery even where it can act in time. *See supra* note 292.

Thus, where the employer or union has a legitimate state court claim against an employee who had filed a charge, the Board will probably be unable to prevent the use of state court discovery to pry into Board matters. Nevertheless, this is not the problem created by *Bill Johnson's* because arguably the majority of suits brought subsequently to *Bill Johnson's* will be baseless.

[358] An injunction under section 10(j) is generally limited to no longer than six months, and terminates automatically on a final order of the Board in the initial unfair labor case. *See* Eisenberg v. Hartz Mountain Corp., 519 F.2d 138, 144 (3d Cir. 1975).

[359] *See Bill Johnson's*, 103 S. Ct. at 2172.

Rules of Civil Procedure apply in proceedings under section 10(j).[360] Although section 10(j) proceedings are designed to be limited in scope[361] and expeditious,[362] some district courts have allowed litigants to use their liberal discovery provisions to obtain information associated with the Board's unfair labor practice proceedings.[363] To allow employers or unions to circumvent the Board's rules in this manner, when it is precisely to avoid such a problem that the Board has petitioned the district court in the first place, would be inconsistent with *Robbins* and the line of cases supporting that decision.[364] District courts dealing with the analogous petition under section 10(1)[365] have limited discovery to the issue raised by the petition for injunction.[366] Section 10(l) requires the Board to seek temporary relief in a delineated class of unfair labor practices after a charge is filed but before the complaint issues. Thus, although section 10(j) is discretionary and section 10(l) is mandatory, the relief sought under both petitions is similar. A limitation on the scope of discovery in a section 10(j) petition would preserve the Board's discovery rules and still enable the district court to have a full and open section 10(j) hearing.

Conclusion

In *Bill Johnson's Restaurants, Inc. v. NLRB*, the Supreme Court was primarily concerned with protecting the constitutional rights of civil litigants. By establishing a narrow reasonable basis standard to safeguard those rights, however, the Court has limited the Board's ability to halt frivolous state court actions. Recognizing this limitation, employers and unions, who have demonstrated a strong desire for pre-hearing discovery, may now begin to bring baseless state court actions to circumvent the Board's restrictive discovery procedures. To close this procedural loophole, and at the same time maintain the rights of civil litigants, the Board should be prepared to use section 10(j) to temporarily enjoin state court actions which it has "reasonable cause" to believe baseless.

The Supreme Court gave the Board wide procedural freedom to deal with the problem of baseless retaliatory civil suits. It would not undercut the *Bill Johnson's* decision to use section 10(j) as a means of isolating employees from discovery related intimidation. On the contrary, section 10(j) would provide a prophylactic remedy to the kind of labor

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[360] *See* Meter v. Minnesota Mining & Mfg. Co., 42 F.R.D. 663, 664 (D. Minn. 1967), *rev'd*, 385 F.2d 265 (8th Cir. 1967).

[361] Squillacote v. International Union, United Auto, et al., 383 F. Supp. 491, 493 (E.D. Wis. 1974). The court states: "The hearing to be held upon a petition for temporary injunctive relief under Section 10(j) has a limited evidentiary scope and purpose and is not intended to determine which litigant should ultimately prevail." *Id.*

[362] Squillacote v. Local 248, Meat & Allied Food Workers, 534 F.2d 735, 743 (7th Cir. 1976).

[363] *See* Meter v. Minnesota Mining & Mfg. Co., 42 F.R.D. 663, 664 (D. Minn. 1976), *rev'd*, 385 F.2d 265 (8th Cir. 1967); Sperandeo v. Milk Drivers & Dairy Employees Local 537, 334 F.2d 381, 384-85 (10th Cir. 1964); Fusco v. Richard W. Kaase Baking Co., 205 F. Supp. 459, 462-63 (N.D. Ohio 1962).

[364] *See supra* notes 87-122 and accompanying text.

[365] 29 U.S.C. § 160(l) (1982). This section provides that whenever a person is charged with a violation of sections 8(b)(4)(A),(B), or (C), 8(b)(7), or 8(e) a preliminary investigation shall be undertaken, and if the investigating officer has reasonable cause to believe that such charge is true she shall petition a federal district court for injunctive relief pending the Board's adjudication of the matter. *See id.*

[366] *See* Samoff v. Williamsport Building & Construction Trades Council, 451 F.2d 272, 274 (3d Cir. 1971); Madden v. Milk Wagon Drivers Union Local 753, 229 F. Supp. 490, 492 (N.D. Ill. 1964).

abuses with which the Court was concerned in both *Bill Johnson's* and *Robbins*. A temporary injunction of the state court action would prevent conflicts between state and Board proceedings, and preserve the rights of all parties.

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